OCTOBER TERM, 1993

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 93-6431

JOHN EARL BUSH,

Petitioner,

v.

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

A - Bush v. Singletary, 988 F.2d 1082 (11th Cir. 1993).

B - Petition for Rehearing and Suggestion for Rehearing En Banc, Bush v. Singletary -- excerpts (discussion of issues from petition).

C - Bush v. Singletary, Order of the Court of Appeals denying rehearing and en banc review (July 20, 1993).

D - Bush v. Singletary, Order of the Court of Appeals staying mandate pending certiorari review (August 9, 1993).

E - Bush v. State, 461 So. 2d 936 (Fla. 1985).

F - Bush v. Wainwright, 505 So. 2d 409 (Fla. 1987).

G - Bush v. Dugger, 579 So. 2d 725 (Fla. 1991).

H - Bush v. Dugger, Order of the United States District Court for the Middle District of Florida.

Attachment A

dict the legal consequences of their actions" and to "facilitate the planning of primary activity and to encourage the settlement of disputes without resort to the courts." *Moragne*, 398 U.S. at 403, 90 S.Ct. at 1789.

In *Admiral's Cove*, an Eleventh Circuit panel held that when an easement falls within the meaning of section 621(a)(2), the property owner cannot deny access to that easement. 835 F.2d at 1362. *Thos. J. White* reaffirmed this holding. 902 F.2d at 908–09. Since both holdings addressed private easements, the panel was bound to follow them. Because it did not, we now have two rules of law in this circuit concerning the proper construction of section 621(a)(2). To potential litigants (and to me) this circuit's interpretation of section 621(a)(2) is confused.

IV.

As I have discussed, there were three reasons why the panel should not have applied the canon of statutory construction to avoid an unconstitutional construction of the Cable Act. First, the panel was bound by Supreme Court precedent that clearly establishes that statutes are not unconstitutional because they do not explicitly provide for just compensation; yet the panel, misunderstanding dictates of the Court's jurisprudence, sought to avoid an illusory unconstitutional construction. Second, the panel was bound by *Thos. J. White*'s and *Admiral's Cove*'s holdings; yet the panel failed to adhere to them. Third, to construe the Cable Act, the panel was not required to avoid its just compensation issue because that issue arose solely from the district court's fashioning of equitable relief; yet the panel found that the takings issue controlled its statutory interpretation. As I expressed in the opening paragraphs of this opinion, the first two reasons each warrant en banc review. The third reason demonstrates how the panel, contrary to the very rule of construction it sought to apply, took an unnecessary excursion into takings jurisprudence.

For these reasons, I respectfully dissent from the court's decision not to rehear this case en banc.

HATCHETT, Circuit Judge, dissenting:

I dissent from the decision to deny rehearing *en banc*.

ANDERSON, Circuit Judge with whom KRAVITCH, Circuit Judge, joins, dissenting:

Respectfully, I dissent from the decision not to rehear this case en banc.

John Earl BUSH, Petitioner–Appellant.

v.

Harry K. SINGLETARY, Secretary, Florida Department of Corrections, Respondent–Appellee.

No. 89–4051.

United States Court of Appeals, Eleventh Circuit.

March 30, 1993.

Following affirmance of first-degree murder conviction and death sentence, 401 So.2d 936, petition for writ of habeas corpus was filed in state court. The Florida Supreme Court, 579 So.2d 725, denied petition and petition for writ of habeas corpus was filed in federal court. The United States District Court for the Middle District of Florida, No. 88-00022-Civ-FTM-13A, George C. Carr, J., denied petition and petitioner appealed. The Court of Appeals held that: (1) sentence of death was not cruel and unusual punishment; (2) prosecutor's presentation was not misleading; and (3) defense counsel was not ineffective at sentencing phase.

11. **Criminal Law** ⇐641.13(6)

Counsel must investigate defendant's background before sentencing in capital murder case.

12. **Criminal Law** ⇐641.13(6)

Adequacy of scope of attorney's investigation into defendant's background before sentencing in capital murder case is to be judged by standard of reasonableness, and after adequate investigation, counsel may reasonably decide not to present mitigating character evidence at sentencing.

13. **Criminal Law** ⇐641.13(7)

Defense counsel's failure to present evidence during sentencing phase of capital murder trial as to defendant's background was reasonable; both defendant's father and brother indicated they did not want to testify and no other family member came forward despite counsel's willingness to talk with them. U.S.C.A. Const.Amend. 6.

14. **Criminal Law** ⇐641.13(6, 7)

Defense counsel acted within wide range of reasonable professional judgment when he chose not to investigate capital murder defendant's psychological history more thoroughly, not have defendant examined by psychiatrist or psychologist, and not to present mitigating psychological evidence at sentencing hearing given what defense counsel could readily observe about defendant, what he knew of defendant's background, and advice of psychiatrist. U.S.C.A. Const.Amend. 6.

15. **Criminal Law** ⇐641.13(7)

Defense counsel's failure during sentencing phase of capital murder case to present evidence that defendant did not kill or intend to kill victim was reasonable; there was no evidence that defendant was physically or psychologically coerced into participating in underlying felony or in murder. U.S.C.A. Const.Amend. 6.

16. **Criminal Law** ⇐641.13(6, 7)

Defense counsel's failure to investigate and present evidence during sentencing phase of capital murder case as to defendant's intoxication at time of offense was reasonable; defendant admitted that he drank less than other participants in crime and officer who stopped defendant and codefendants on night of murder testified that defendant was calm and collected. U.S.C.A. Const.Amend. 6.

Billy H. Nolas, Julie D. Naylor, Ocala, FL, for petitioner-appellant.

Celia A. Terenzio, Asst. Atty. Gen., Dept. of Legal Affairs, West Palm Beach, FL, for respondent-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before KRAVITCH, EDMONDSON, and COX, Circuit Judges.

PER CURIAM:

John Earl Bush, a Florida inmate, was convicted of first-degree murder and sentenced to death. He filed a 28 U.S.C. § 2254 petition challenging both his conviction and his sentence. The district court denied relief, and Bush appeals. We affirm.

FACTS

On April 27, 1982, John Earl Bush and three other men abducted Frances Slater from the convenience store where she worked. Her body was found later that day, thirteen miles away. She had been stabbed in the abdomen and shot once in the back of her head at close range. The convenience store's cash register and floor safe had been robbed of approximately $134.00. Bush was tried for the crimes in 1982 and convicted, following a jury trial, of first degree murder, armed robbery and kidnapping.

Four pretrial taped statements made by Bush to law enforcement authorities were introduced at trial. The Supreme Court of Florida described these statements as "the only known version of the events [which] are presented by Bush in the light most favorable to him." *Bush v. State*, 461 So.2d 936, 937 (Fla.1984). In the first statement, Bush denied any involvement with the Slater abduction but said that on the night in question he had given a ride to

ing on the adequacy of counsel issues, the district court denied relief on all claims.

The district court issued a certificate of probable cause to appeal, and we subsequently held proceedings in this court in abeyance to allow Bush to pursue state habeas proceedings in the Florida Supreme Court. The Supreme Court of Florida, however, denied relief. *Bush v. Dugger*, 579 So.2d 725 (Fla.1991).

ISSUES ON APPEAL

Bush argues on this appeal that the district court erred in denying relief on four claims. His brief articulates the issues as following:

(1) Whether Mr. Bush's sentence of death constitutes cruel and unusual punishment because the state courts did not make a finding on his individual culpability sufficient to satisfy the Eighth Amendment.

(2) Whether the prosecutor's inaccurate, inconsistent, and misleading presentation violated the Eighth and Fourteenth Amendments.

(3) Whether the state's comments and the trial court's instructions that a verdict [recommending] life imprisonment had to be rendered by a majority of the jury misled the jury as to its role at sentencing and created the risk that death may have been imposed because of inappropriate factors, in violation of the Eighth and Fourteenth Amendments.

(4) Whether Mr. Bush received ineffective assistance of counsel at the sentencing phase of his capital trial.

Brief for Appellant at 1.

We will address each issue in turn.

DISCUSSION

1. Whether Bush's sentence of death constitutes cruel and unusual punishment because the state courts did not make a finding of his individual culpability sufficient to satisfy the Eighth Amendment.

[1] Bush argues that the death sentence is unwarranted in this case because the state courts did not make a finding that he was responsible for the murder of Ms. Slater. Principles of proportionality embodied in the Eighth Amendment prohibit the imposition of the death penalty upon persons who, though guilty of capital mur-

the Florida Supreme Court refused to review certain of his claims the court found procedurally barred.

Claim 8: The petitioner was denied his right to an individualized and fundamentally fair and reliable capital sentencing determination because the State intentionally relied upon victim impact, comparable worth, and other improper factors in its efforts to obtain a sentence of death.

Claim 9: The petitioner was deprived of Eighth and Fourteenth Amendment rights by prosecutorial comments and judicial instructions which diminished the jurors' sense of responsibility during the sentencing phase of his trial.

Claim 10: Petitioner's statements to law enforcement personnel were obtained in violation of *Miranda v. Arizona* and the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Claim 11: The petitioner was deprived of Eighth and Fourteenth Amendment rights by judicial instruction which may have misled the jury into thinking that it had to reach a majority recommendation regarding sentencing.

Claim 12: The prosecution's violation of state discovery rules violated petitioner's due process rights, his right to a fair trial, and his right to confront and cross-examine witnesses against him, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

Claim 13: The petitioner was deprived of his rights under the Sixth, Eighth, and Fourteenth Amendments by the prosecutor's use of hypnotically induced testimony at trial.

Claim 14: Petitioner's Eighth Amendment rights to a reliable sentencing determination were violated by the improper introduction of inflammatory and prejudicial photographs at his capital trial.

Claim 15: Bush was deprived of his Sixth Amendment rights by the prosecutor's introduction into evidence the results of a post-arraignment line-up conducted before Bush had been appointed counsel, and his appellate counsel was ineffective in not raising this issue on appeal.

Claim 16: The petitioner's Eighth Amendment rights were violated by the sentencing court's refusal to find the mitigating circumstances clearly set out in the record.

Claim 17: Bush was deprived of rights under the Fifth, Sixth, Eighth and Fourteenth Amendments by prosecutorial and judicial "burden-shifting" during the sentencing phase of his trial.

cient to support a finding that his involvement constituted the intent or contemplation required by *Enmund*.

461 So.2d at 941.

We hold that the trial judge's finding satisfies the requirement imposed by *Enmund* and its progeny.

Bush's argument that the Florida Supreme Court's statement that Bush's statements "constitute the only known version of the events" would contradict a finding that Bush intended to kill the victim is meritless. The Supreme Court simply summarized Bush's fourth statement as presented by Bush "in the light most favorable to him." *Id.* at 937. The suggestion that the Florida Supreme Court was finding as a fact that Bush's fourth statement represented the truth about the events in question and that the court's description of Bush's statements, therefore, constituted a finding by that court that Bush did not have the requisite intent is untenable.

2. Whether the prosecutor's inaccurate, inconsistent, and misleading presentation violated the petitioner's rights under the Eighth and Fourteenth Amendments.

[4] Bush contends that the prosecutor asserted that Bush was the triggerman and ringleader; that the same prosecutor asserted in Parker's trial that Parker was the triggerman and ringleader; and that the same prosecutor asserted in Cave's trial that Cave was the triggerman and ringleader. Moreover, Bush contends the prosecutor presented misleading evidence during Bush's trial to support the theory that Bush was the triggerman, even though the prosecutor knew that theory was false. This inaccurate, misleading, and inconsistent presentation, Bush contends, was fundamentally unfair, violated due process, and rendered unreliable the death sentence imposed.

The State responds that Bush focuses on an isolated comment by the prosecutor; that the State did not present any evidence or argument to suggest that Bush was the triggerman but, on the contrary, relied on the felony-murder theory to convict Bush. The State denies presenting any misleading evidence.

The Supreme Court has said that improper argument by a state prosecutor can make a trial so fundamentally unfair as to deny a defendant due process. *Donnelly v. De Christoforo*, 416 U.S. 637, 646, 94 S.Ct. 1868, 1873, 40 L.Ed.2d 431 (1974). In this instance, however, the arguments made by the prosecution did not deprive Bush of his due process rights.

The State's evidence at trial and the prosecutor's arguments were predicated on two theories of first degree murder: felony murder and aiding and abetting premeditated murder. One statement by the prosecutor suggested that Bush was the triggerman, but this isolated suggestion was inconsistent with the prosecutor's overall presentation and argument. The prosecutor correctly told the jury that the State did not have to prove that Bush touched or stabbed the victim to sustain a first degree murder conviction. R.6 at 988–89, Trial Transcript. It is absolutely clear, therefore, as the district court found, that this single comment by the prosecutor could not have affected the judgment of the jury.

The evidence presented by the State that Bush argues was misleading relates to the caliber of the murder weapon. Bush argues that the evidence regarding the bullet found in the victim's body is not consistent with the evidence regarding the caliber of Bush's gun. He contends that an unfired .38 caliber round was found in his car, but that the fragment found in the victim's body was part of a .32 caliber bullet. Bush argues that the State presented the theory connecting the unfired round found in Bush's car to the bullet found in the victim's body while knowing it to be inaccurate.

The petitioner must prove that misleading evidence was presented and that it was material in obtaining his conviction. *Donnelly*, 416 U.S. at 647, 94 S.Ct. at 1873; *Tejada v. Dugger*, 941 F.2d 1551, 1556 (11th Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 1199, 117 L.Ed.2d 439 (1992).

A ballistics expert at trial testified that the bullet that killed the victim could have

(b) counsel failed to investigate and present evidence of Bush's intellectual and psychological impairments,

(c) counsel failed to investigate and present evidence to show that Bush did not kill or intend to kill,

(d) counsel failed to investigate and present evidence to show that Bush's participation in the crime was the result of physical and psychological coercion, and

(e) counsel failed to investigate and present evidence to show that Bush was intoxicated at the time of the offense.

District Court Opinion at 32.

[9, 10] To prove that counsel was constitutionally ineffective, the petitioner must demonstrate that counsel's performance was deficient and that the deficiency prejudiced his defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. In evaluating petitioner's claims on the deficiency issue, we will consider whether counsel acted outside the wide range of reasonable professional judgment. *Id.* at 690, 104 S.Ct. at 2066. On the prejudice issue, the petitioner must show that, but for counsel's unprofessional errors, there is a reasonable probability that the sentencer would have weighed the balance of aggravating and mitigating factors to find that the circumstances did not warrant the death penalty. *Id.* at 694, 104 S.Ct. at 2068. First, we address the allegations of counsel's deficiency. We then address the prejudice issue by considering the evidence Bush claims should have been introduced and the likely impact of that evidence on the sentencers' determinations.

A. Deficiency

The district court held an evidentiary hearing on the issue of effectiveness of counsel and made extensive findings of fact regarding Muschott's strategy. The district court described Muschott's dilemmas and his strategy to overcome them as follows:

> Faced with Bush's prior admissions, and with Muschott's own conclusions [that Bush was very aggressive and cold and appeared unremorseful and] that Bush was competent and that he had assumed a leadership role in the Slater murder as well as in the 1974 rape of the nineteen year old, Muschott decided that his best defense (and his best chance of avoiding the death penalty for his client) was to argue that Mr. Bush never had any intention of killing Frances Slater, that he wanted no part in her death and that, in fact, he had schemed against his codefendants to spare her life.

District Court Opinion at 14 (citations omitted). There was evidence supporting this theory. In Bush's fourth taped statement he confessed to stabbing Slater but stated that he sought to feign her death so that the others would leave her alone. The theory was also supported by Bush's claims that Pig Parker had attempted to force Bush to take the gun and to shoot Slater, but that Bush refused. In addition, the examining physician testified that the stab wound was superficial and not fatal. Muschott emphasized these aspects of the evidence during the guilt/innocence phase of the trial, along with the voluntariness of Bush's confessions and assistance to the investigating officers. After considering the evidence, however, the jury convicted Bush.

The district court described Muschott's reasons for not presenting evidence in mitigation during the sentencing phase of the trial as follows:

> Mr. Muschott chose [not to present] what he had regarding Bush's family background, prison experience, and possible intoxication or mental disability. He made his decision for three reasons: (1) there was no mental disability to exploit and any attempt to create one would only have damaged his credibility with the jury; (2) Bush had confessed that he knew what he was doing on the night of the murder and any post-trial attempt to show intoxication would, likewise, have damaged his credibility; and (3) any evidence offered in an attempt to paint Bush as a docile, sympathetic and "sheeplike" follower would have been false, as well as unsuccessful, and would have invited the prosecutors to offer de-

tails of the prior rape,[2] robbery and kidnapping in rebuttal.

Id. at 15.

Muschott decided, instead, to ask the jurors, at sentencing, to take with them to the jury room the recording of Bush's third statement. This statement was the only one, in Muschott's opinion, in which Bush appeared remorseful. He hoped that by leaving the jury with a sympathetic presentation of Bush and by not inciting the prosecution to present the details of the 1974 rape, he could avoid the death penalty for his client. He was concerned that Bush might appear cold or unremorseful and might be led by the prosecutor to testify to his own detriment, so Muschott discussed the situation with Bush, Bush's father, and Bush's brother. Bush decided not to testify at sentencing.

Against Muschott's advice, however, during the sentencing hearing, Bush decided to take the stand. After a brief direct examination by Muschott, Bush argued with the prosecution on cross-examination, repeatedly challenged the prosecutor to prove the case against him, and could not remember what, if anything, the victim had said before she died. R.7 at 1187–1267, Sentencing Transcript (cross-examination of Bush).

[11, 12] Bush now contends that his counsel was ineffective because he failed to investigate and present mitigating evidence at sentencing. Counsel must investigate defendant's background before sentencing. *Thompson v. Wainwright*, 787 F.2d 1447, 1450 (11th Cir.1986), *cert. denied*, 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987). The adequacy of the scope of an attorney's investigation is to be judged by the standard of reasonableness. *Mitchell v. Kemp*, 762 F.2d 886, 888 (11th Cir.1985), *cert. denied*, 483 U.S. 1026, 107 S.Ct. 3248, 97 L.Ed.2d 774 (1987). After an adequate investigation, counsel may reasonably decide not to present mitigating character evidence at sentencing. *Stanley v. Zant*, 697 F.2d 955, 961–62 (11th Cir.1983), *cert. denied*, 467 U.S. 1219, 104 S.Ct. 2667, 81 L.Ed.2d 372 (1984).

[13] Bush first contends that Muschott should have presented evidence detailing Bush's sympathetic background, including his disadvantaged childhood and his prison experience. The district court found that Muschott investigated Bush's personal background and evaluated the usefulness of the character and background information. Muschott decided that this evidence was not significantly beneficial to his client's case and chose not to use it because of his belief that the State would have introduced, in rebuttal, evidence of Bush's violent past and the facts regarding his prior rape conviction. These findings have support in the district court record.

Muschott discussed possible mitigating evidence with Bush, his brother, his father, his girlfriend, and his brother-in-law. Muschott was well aware of Bush's poor family background and the fact that he had been abused while in prison. The district court found that both Bush's father and brother indicated they did not want to testify, and no other family member came forward despite Muschott's willingness to talk with them. We find no error in the district court's conclusion that Muschott's evaluation of this potential evidence as not "significantly beneficial" was a professionally reasonable one.

[14] The contention that Muschott failed to investigate and present evidence of Bush's intellectual and psychological impairments is similarly without merit. After Muschott investigated the possibility of psychological mitigation, he concluded that this avenue was one he could not develop. The district court evaluated the evidence on this issue and found that Muschott did not believe, nor did he have reason to believe, that Bush was mentally deficient.

In addition to the information revealed through Muschott's conversations with Bush, Bush's lawyer for the earlier criminal case and Bush's family, Muschott was aware of a number of facts also known by the prosecution that would rebut an allegation of mental deficiency. Muschott testified that Bush had no problems communicating and gave no indication that he was ever out of touch with reality. Bush displayed intelligence during the events at issue, during his interrogations by law enforcement, and during trial. He demonstrated the ability to formulate options and to make his own decisions. For example, although his accomplices suggested shooting the police officer who stopped them after the murder for a defective taillight, Bush persuaded them to "wait and see what happens." R.6 at 383, Transcript of Evidentiary Hearing (Muschott's recollection of the events). The police officer who had stopped the men in the car described Bush, who was driving and who owned the vehicle, as "calm, cool, and collected." *Id.* Bush instituted measures to regain possession of his car after the police confiscated it. Bush's actions also revealed his appreciation of the criminality of his conduct. He hid the murder weapon. He gave four statements to the police, initially claiming an alibi and later explaining his involvement in the crimes.

Muschott discussed what he knew about petitioner with a psychiatrist, Dr. Tingle, who determined that he could not assist in the defense of the petitioner in the guilt or sentencing phases of the trial. The district court recognized that

> Muschott weighed the very questionable beneficial value of a defense based on psychology against the very real threat that such a defense would open the door for the state to introduce in rebuttal, the details of the 1974 rape and damaging statements of Bush's codefendants. He decided that the real threat outweighed the potential benefit.

District Court Opinion at 34.

Muschott chose not to investigate Bush's psychological history more thoroughly, not to have Bush examined by a psychiatrist or psychologist, and not to present mitigating psychological evidence at the sentencing hearing. Given what Muschott could readily observe about Bush, what Muschott knew of Bush's background and the advice of Dr. Tingle, Muschott acted within the wide range of reasonable professional judgment.

[15] Bush also argues that Muschott failed to investigate and present evidence to show that Bush did not kill or intend to kill. The record does not support this argument. Bush alleges that Muschott should have introduced the statement of Georgiana Williams, Bush's girlfriend, that one of the codefendants had confessed to her that he, not Bush, shot the victim. With the exception of an isolated comment by the prosecution, there was no indication throughout the trial that Bush was the shooter. All of the evidence presented indicated that Bush stabbed the victim and a codefendant shot her. Counsel could quite reasonably believe that the introduction of this statement from Bush's girlfriend would contribute nothing to the sentencing phase of the trial and the jury might have perceived it as self-serving.

There is no reasonable argument to be made under the facts to support Bush's argument that his lawyer should have presented evidence that Bush was physically or psychologically coerced into participating in the underlying felony or in the murder of Ms. Slater. The record clearly indicates Bush's own statements to the contrary. Bush admitted that he agreed with the others to rob someone. R.4 at 755, Trial Transcript. He was an active participant in the robbery and kidnapping. A witness identified Bush as one of the men seen in the store where Slater worked, not the one waiting in the car; Bush admitted to owning both the getaway car and the murder weapon; and he did all the driving on the night of the crime. Bush had already stated that he knew what he was doing throughout the commission of the robbery, kidnapping, and murder.

Muschott's approach to the evidence concerning the extent of petitioner's involvement was reasonable. We agree with the district court that "*Strickland* does not compel an attorney to urge an argument which he reasonably finds to be futile, let

2. The jury knew that petitioner had been convicted of a serious crime, but the jurors did not know that the earlier crime was committed by several young men who kidnapped, robbed, and raped a woman.

L.Ed.2d 652 (1992); *Middleton v. Dugger*, 849 F.2d 491, 493 (11th Cir.1988). At least since *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2605, 57 L.Ed.2d 973 (1978), the importance of presenting mitigating evidence has been a prominent feature of the Supreme Court's Eighth Amendment jurisprudence. *See, e.g., McKoy v. North Carolina*, 494 U.S. 433, 444, 110 S.Ct. 1227, 1234, 108 L.Ed.2d 369 (1990) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 327, 109 S.Ct. 2934, 2951, 106 L.Ed.2d 256 (1989)); *Skipper v. South Carolina*, 476 U.S. 1, 4–5, 106 S.Ct. 1669, 1670–71, 90 L.Ed.2d 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 110–12, 102 S.Ct. 869, 874–75, 71 L.Ed.2d 1 (1982). Making the sentencer aware of all relevant mitigating circumstances is necessary to give practical meaning to the bedrock Eighth Amendment principle that "'respect for humanity . . . requires consideration of the character and record of the individual offender'" in capital cases. *Lockett*, 438 U.S. at 604, 98 S.Ct. at 2964 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976)). Reasonable investigation, therefore, (which includes making reasonable decisions not to pursue certain inquiries) is an absolute prerequisite for constitutional assistance of counsel. When counsel breaches the duty of reasonable investigation, even strategic or tactical decisions regarding the sentencing phase, which normally are entitled to great deference, must be held constitutionally deficient. *See, e.g., Horton*, 941 F.2d at 1462.

In my opinion, Muschott failed to conduct even a minimally adequate search into Bush's background. At the evidentiary hearing in the district court, Muschott conceded that he prepared no mitigating evidence whatsoever to present at sentencing. Dist.Ct.Tr. at 402. He never looked into Bush's psychological history. He never sought Bush's school or prison records. *Id.* at 319. He never developed evidence of the hardships of Bush's abusive and tragic life growing up in a family of seasonal farmworkers. *Id.* at 321. He never developed any evidence that might have explained or softened the effect on the jury of Bush's 1974 conviction.[1] *Id.* at 344. These items were not hidden facts, discoverable only through substantial effort. They were basic background facts and records which the most cursory investigation and preparation would have revealed. And, significantly, Muschott admitted that he did not have a reasonable, tactical reason for not seeking or developing much of this evidence. *See, e.g., id.* at 319. He simply did not do it.

Had Muschott conducted a competent investigation he would have discovered information that certainly would have informed, and might very well have altered, his decision not to present any evidence in mitigation. A 1974 report that was included in Bush's incarceration records, for example, stated that Bush had an obsessive-compulsive personality with an incipient pathology, uncertain control of his impulses, and sometimes loosened ties to reality. The reporting doctor worried that Bush was primed for a "possible future psychosis" which might be hastened by "any stress situation."[2] This warning is consistent with the testimony in the district court of Dr. Carbonell, who reported that Bush possesses borderline intellectual functioning and possibly suffers from brain damage and other mental health problems. It suggests that Bush may have suffered from a severe emotional disturbance at the time of the homicide in this case, a statutory mitigating circumstance under Florida law. Fla.Stat.Ann. § 921.141(6)(b). Even if Bush's mental health problems did not rise to the level of a severe emotional disturbance, the 1974 report identifies some mental health problems which could have been introduced at the penalty phase as a non-statutory mitigating circumstance. At the very least, the report would have placed Muschott on notice that further investiga-

1. In fact, Muschott admitted he never even obtained the transcript of, or the Division of Youth Services records about, that case. Dist.Ct.Tr. at 296.

2. Bush's subsequent years in prison where, as a teenager, he apparently was raped and assaulted would undoubtedly constitute a "stress situation."

aware of this information, he might very well have chosen to introduce humanizing evidence of Bush's family background and character traits, knowing that if the State attempted to countermand that evidence with the 1974 crime, he could surrebut with the statements of the Florida officials.

In sum, Muschott's investigative effort in preparing for the penalty phase of Bush's trial amounted to one short conversation with Dr. Tingle based solely on Muschott's own inconsiderable and untrained observations and a few conversations with Bush's father, brother, and girlfriend, most of which were initiated by them. In my view, Muschott failed to discharge his duty of reasonable investigation. Consequently, his strategy at sentencing—doing nothing more than asking the jury to listen to the one of Bush's four statements in which he sounded most remorseful—was constitutionally tainted.

Muschott also failed to render constitutionally adequate assistance of counsel when he chose not to introduce mitigating evidence that could not reasonably have opened the door to damaging evidence in rebuttal. Muschott feared that if he introduced mitigating evidence, including Bush's sympathetic background and intellectual and mental health deficiencies, the State would introduce statements by Bush's codefendants that his involvement in the murder had been extensive, as well as details of the 1974 crime. Much of the mitigating evidence that might have persuaded the jury to vote for life, however, was completely distinct from this potential rebuttal evidence. That Bush is the loving father of a daughter with Down's Syndrome or once saved a drowning child, for example, has nothing to do with the details of the 1974 crime or the extent to which Bush participated in the murder, and cannot *reasonably* have given rise to the fear of rebuttal. The same goes for Bush's mental health problems and for the hardships Bush endured as an abused child in a family of seasonal workers, with a disabled and alcoholic father and a mother who died when he was just a boy.[6]

I agree with the majority that Muschott acted reasonably when he asked the jury to listen to the statement in which Bush sounded most remorseful. The Sixth Amendment problem in this case is not with what Muschott *did* but what he did *not* do. He did not conduct a constitutionally adequate investigation into Bush's background and he did not introduce significant evidence that could not reasonably have given rise to damaging rebuttal. That counsel made many competent decisions does not preclude a finding of ineffective assistance of counsel. The right to effective assistance of counsel may be violated "by even an isolated error of counsel if that error is sufficiently egregious and prejudicial."[7] *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986); *accord Strickland*, 466 U.S. at 693–96, 104 S.Ct. at 2067–69; *United States v. Cronic*, 466 U.S. 648, 657 n. 20, 104 S.Ct. 2039, 2046 n. 20, 80 L.Ed.2d 657 (1984). Muschott's abdication of his responsibility to investigate and present mitigating evidence was a significant error, in my view, more than sufficiently egregious to implicate Bush's right to constitutionally effective counsel. The range of professional judgment acceptable under the Sixth Amendment is wide, but not boundless.

II.

The majority also errs in holding that Bush does not satisfy the prejudice prong of *Strickland*. Contrary to the majority's summary conclusion, a reasonable likelihood does exist that but for Muschott's constitutionally deficient performance Bush's jury would have rejected the death penalty. All that is necessary to satisfy

6. In addition, the judge had ruled that Bush's inability to cross-examine the codefendants at sentencing rendered their statements about the extent of Bush's participation in the crime inadmissible. *See* Sentencing Hearing Tr. at 48–49.

7. For the same reason, the fact that Bush took the stand at the sentencing phase is not determinative of the Sixth Amendment issue in this case. That Bush himself made a tactical error when he insisted on testifying does not render Muschott's independent failure to prepare for sentencing any more constitutionally palatable

the prejudice prong in this case is a reasonable probability that *one* additional juror would have voted for life. A reasonable probability is simply a likelihood sufficient to undermine confidence in the jury's death recommendation, not even proof by a preponderance of the evidence. *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2068. Notwithstanding Muschott's constitutionally inadequate performance, the State could muster only seven votes for death. Under Florida law a six-six split constitutes a recommendation against the death penalty. *See Hamich v. State*, 437 So.2d 1082, 1086 (Fla.1983), *cert. denied*, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984). The sentencing judge can override such a recommendation only if the facts suggesting a death sentence are so clear and convincing that virtually no reasonable person can conclude that life imprisonment is an appropriate sentence. *See Tedder v. State*, 322 So.2d 908, 910 (Fla.1975). That standard could not have been met in this case.

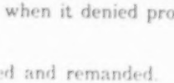
Abundant mitigating evidence was available to humanize Bush in the eyes of the jury, including his loving devotion to his child suffering from Down's Syndrome and his borderline intellectual functioning (if not more serious mental health problems). If only some of that evidence had been introduced, the State would not have been able to emphasize to the jury, as it did, that "[t]here has been no testimony concerning the character of the defendant other than the fact that he was previously convicted of a serious crime." Sentencing Hearing Tr. at 155. Because no mitigating evidence whatsoever was introduced, the jury was left with only the prosecution's view: that John Earl Bush possessed no positive human qualities worth sparing.

In *Blanco v. Singletary*, *supra*, we wrote:

> Given that some members of Blanco's jury were inclined to mercy even without having been presented with any mitigating evidence and that a great deal of mitigating evidence was available to Blanco's attorneys had they more thoroughly investigated, we find that there was a reasonable probability that Blanco's jury might have recommended a life sentence absent the errors.

943 F.2d at 1505. Likewise, in this case, nearly half of Bush's jurors were inclined to mercy notwithstanding Muschott's defective performance. Substantial mitigation was available if Muschott had only conducted a basic investigation. There is far more than a mere reasonable probability that John Earl Bush today faces execution because of constitutionally ineffective assistance of counsel.

Accordingly, I respectfully dissent from the denial of habeas relief as to sentencing.



Reinhold DIDIE, Plaintiff-Appellee,

Hakan Bennhagen, Plaintiff,

v.

Ashley HOWES, Jr., Defendant-Appellant.

No. 91-5797.

United States Court of Appeals,
Eleventh Circuit.

April 20, 1993.

Appeal was taken from order of the United States District Court for the Southern District of Florida, No. 89-1008-CV-LCN, Lenore Carrero Nesbitt, J., denying pro se motion for Rule 11 sanctions in action arising from contract to restore yacht. The Court of Appeals, Birch, Circuit Judge, held that district court abused its discretion in not holding hearing to determine whether Rule 11 sanctions were appropriate when it denied pro se Rule 11 motion.

Reversed and remanded.

Attachment B

STATEMENT OF COUNSEL AND STATEMENT OF THE ISSUES/QUESTIONS PRESENTED

Counsel express a belief, based upon a reasoned and studied professional judgment, that the panel decision is contrary to the decisions of the United States Supreme Court and the United States Court of Appeals for the Eleventh Circuit which are listed below, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions and an application of precedent in conformity with the standards of the United States Supreme Court and this Circuit. Counsel also express a belief that the issues presented involve important questions whose resolution by the full Court shall aid in maintaining uniformity of the decisional law of this Circuit and conformity with the decisional law of the United States Supreme Court.

I. As to the issue presented in section I:

Appellant respectfully submits that the decision of the panel majority on his claim of ineffective assistance of counsel at capital sentencing is in conflict with the precedent of this Circuit in cases such as Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991); Horton v. Zant, 941 F.2d 1449 (11th Cir. 1992); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987); and Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987).

As Judge Kravitch discussed in her dissent, see Bush v. Singletary, No. 89-405 (11th Cir. March 30, 1993) (appended at App. A hereto), although trial defense counsel said he had a "tactic" at the hearing, that "tactic" cannot be deemed "informed" or "reasonable" under the established precedent of this Circuit. Moreover, as Judge Kravitch's dissent also discusses, although the panel devoted little analysis to the question of prejudice, the panel majority's analysis cannot be squared with the fact that this Circuit has on numerous previous occasions "held that a failure to present similar [and indeed, less substantial] mitigating evidence at sentencing ... was sufficient to establish prejudice." Horton v. Zant, 941 F.2d at 1463. See also App. C (outlining the mitigation).

As a matter of this Circuit's law, Appellant established that counsel's performance was deficient and that he was prejudiced. The panel majority's opinion is not only inconsistent with the Circuit's law, at its essence it overrules that law. Appellant accordingly submits that rehearing and en banc review are appropriate to resolve the conflicts between the majority opinion in Bush and the precedent of this Circuit -- precedent embodied in the decisions listed above and in Judge Kravitch's dissent.

If an attorney's asserted "tactic", even when based on inadequate investigation and preparation, insulates that attorney against a claim of ineffective assistance of counsel, the full Court should say so. The panel majority's opinion essentially overrules the holdings of Horton and Blanco -- each holding that

"tactics" must be informed and reasonable -- and it will affect future cases. The analysis of this case pursuant to the Circuit's pre-Bush law embodied in Judge Kravitch's dissent (and a comparison of that analysis to the majority's opinion) demonstrates that review by the full Court is necessary to maintain uniformity in the Circuit's decisional law.

II. As to the issue presented in section II:

Appellant respectfully submits that rehearing and review by the full Court are appropriate to resolve the conflict between the panel majority's holding and the Supreme Court's decisions in Enmund v. Florida, 458 U.S. 782 (1982); Cabana v. Bullock, 474 U.S. 376 (1986); and Tison v. Arizona, 107 S.Ct. 1676 (1987). Enmund, Bullock and Tison hold that a death sentence cannot be imposed on one who does not kill, intend to kill or attempt to kill. To effectuate this eighth amendment requirement, these Supreme Court precedents require the state courts to find at least that the defendant was a "major participant" and that he either intended death or had a reckless indifference to human life. As the panel majority opinion indicates, neither the jury's verdict nor the Florida Supreme Court's direct appeal opinion can be viewed as making the requisite findings in Appellant's case. See Bush v. Singletary (majority opinion), slip op. at 8-9. The panel, however, denied relief by holding that the trial judge's statement when he rejected the statutory "accomplice whose participation was relatively minor" mitigating factor was sufficient. Cf. App. D (analyzing the state courts' rulings on the issue). All that the

trial judge said, however, was that Mr. Bush was a "participant" -- all that he found was the first part of the two-part finding which Tison requires. Nowhere did the jury, Florida Supreme Court or trial judge find that Mr. Bush intended to kill, attempted to kill or was recklessly indifferent to human life. See, e.g., Bush (majority opinion), slip op. at 9 (quoting trial judge's statement); see also App. D (analyzing the state courts' rulings in this case in light of Enmund, Bullock and Tison).

Bullock and Tison expressly hold that state court "sufficiency" determinations -- that as a matter of accomplice law the defendant should be held responsible -- are insufficient to meet the eighth amendment requirement of findings of fact as to the defendant's mental state. In Appellant's case, the state courts' rulings involve no more than such a "sufficiency" determination. The panel's ruling is not in accord with the Supreme Court's precedent.

Appellant submits (complemented by the analysis included in App. D hereto) that the panel majority's decision is in conflict with the decisions of the United States Supreme Court in Enmund v. Florida, Cabana v. Bullock and Tison v. Arizona and that rehearing and review by the full Court are appropriate to maintain uniformity between the decisional law of this Circuit and the law of the United States Supreme Court.

Billy D. Nolas

COUNSEL FOR PETITIONER/APPELLANT

PROCEDURAL HISTORY

Four tape recorded statements obtained by law enforcement officers from Mr. Bush were played during the trial. These statements "constitute the only known version of the events ...." Bush v. State, 461 So.2d 936, 937 (Fla. 1985). The statements were

> to the effect that [Mr. Bush] did not realize that his accomplices, Alfonso Cave, "Pig" Parker and Terry Johnson, were planning to rob the convenience store, and that during and after the robbery he was under their domination. Bush states that after the robbery, they drove toward Indiantown, when his accomplices ordered him to stop. The victim was pushed out of the car and Bush avers that he intended to set her free. However, the accomplices decided that Slater might be able to identify them and they told Bush to dispose of her. Bush, not desiring to kill the victim, faked a blow at her with his knife and stabbed her superficially. Slater fell to the ground and an accomplice, Parker, shot her.

Bush, 461 So.2d at 938. The testimony of the medical examiner, Dr. Wright, confirmed that the knife wound was superficial (ROA 465) and that Ms. Slater died as a result of the gunshot wound (ROA 471).

The jury convicted. At sentencing, defense counsel offered no evidence in mitigation. "[T]he jury recommended, in a 7-5 advisory sentence, that the death penalty be imposed. The trial judge, citing three aggravating factors and no mitigating factors, sentenced Bush to death." Bush, 461 So.2d at 938.

The convictions and death sentence were affirmed on direct appeal. Bush v. State, 461 So.2d 936 (Fla. 1985). The subsequent history of this case was outlined by the panel. See Bush v. Singletary (majority opinion), slip op. at pp. 3-6.

REASONS FOR GRANTING REHEARING AND EN BANC REVIEW

(I)

THE CONFLICTS BETWEEN BUSH AND THIS COURT'S PRECEDENT ADDRESSING QUESTIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL AT CAPITAL SENTENCING

A. Introduction

"To investigate and develop available mitigating evidence is a basic and unshakable obligation of defense counsel in all capital cases." Bush v. Singletary, (Kravitch, J., dissenting) at dissent p. 1, citing Strickland v. Washington, 466 U.S. 668, 691 (1984); Blanco v. Singletary, 943 F.2d 1477, 1500 (11th Cir. 1991); Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991); Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988). As Judge Kravitch noted, because "[r]easonable investigation ... [is a] prerequisite for constitutional assistance of counsel," "[w]hen counsel breaches the duty of reasonable investigation, even strategic or tactical decisions regarding the sentencing phase ... must be held constitutionally deficient." Id. at 2, citing Horton, 941 F.2d at 1462. Judge Kravitch's opinion is included in the appendix hereto at App. A.

As a matter of this Circuit's law (see Blanco, Horton, Blake, Armstrong, Cunningham, Stephens, Middleton, Magill, Harris, supra) counsel breached the constitutional duty in this case. He failed to investigate just as the attorneys in each of the cases listed above failed to investigate. See Bush, supra (Kravitch, J., dissenting).

Counsel admitted at the evidentiary hearing that he undertook no efforts which can be deemed "reasonable" investigation or preparation under the law of this Circuit. See App. B (analyzing counsel's hearing testimony pursuant to the law of the Eleventh Circuit). As a result, a substantial body of available mitigating evidence was not known to counsel and, consequently, not heard by the jury and judge at sentencing. This evidence -- outlined in detail in the materials included in Appendix C -- exceeds what has been found sufficient to establish "prejudice" as a matter of this Circuit's law in Blanco, Horton, Armstrong, Middleton, Stephens, Harris, inter alia. See also Bush (Kravitch, J., dissenting) (App. A); App. B, part C (analyzing the issue of "prejudice" pursuant to this Circuit's law).

Judge Kravitch's opinion and the materials appended hereto demonstrate that under the pre-Bush law of this Circuit, counsel's performance could not be deemed informed or reasonable. He did not adequately investigate and prepare. Indeed, as counsel himself acknowledged when he testified at the hearing, this attorney had no "tactic" for his failure to investigate. See App. B; see also App. A. The proper development of mitigating evidence would have been important not only for its own value, but also for the effect that a properly developed penalty phase case would have had on a reasonable attorney's decisions. See Blanco, supra.

Given these circumstances, the pre-Bush law of this Circuit established that counsel's decisions could not be deemed "reasonable". See Blanco v. Singletary, 943 F.2d 1477, 1500-1503

(11th Cir. 1991); Horton v. Zant, 941 F.2d 1449, 1460-63 (11th Cir. 1991) (each holding expressly that under the law of this Circuit, an attorney's failure to investigate and prepare appropriately precludes the making of choices which can be deemed "reasonable" and that the decisions of counsel under such circumstances cannot be deemed a "reasonable tactic" as a matter of law).

Counsel testified that the course he followed, without adequately investigating in the first instance, was to present no mitigation to support a verdict of life and he, in fact, developed and presented no mitigating evidence (See App. B). Given the nature of Florida's sentencing scheme -- that a jury recommendation of life without a "reasonable basis" in the record such as mitigating evidence supporting it may be overridden, Stevens v. State, 552 So.2d 1082, 1085 (Fla. 1989) -- and given counsel's own testimony that there was a "consensus" and "substantial likelihood" that the death penalty "would be imposed [by the judge] regardless of the jury's recommendation" (Tr. 363) (emphasis added), counsel's failure to develop and present any mitigation cannot be deemed adequate attorney performance under this Court's law. With such a "substantial likelihood" that death would be imposed by the judge regardless of the jury's verdict, it was especially important for counsel to develop and present mitigation in order to establish a "reasonable basis" for a life recommendation. See Porter v. Wainwright, 805 F.2d 930, 936 (11th Cir. 1986), relied upon in Stevens, 552 So. 2d at 1086-87.

Counsel's failure to develop mitigating evidence here was unreasonable because it was a decision that made a sentence of death more likely, whether or not the jury recommended life; because of the facts elicited from him and the prosecutor at the hearing demonstrating that there was no true rebuttal for most of the mitigating evidence which could have been presented (see App. A, opinion of Judge Kravitch); and because counsel's decision was made without the benefit of a reasonable and adequate investigation and development of available mitigating evidence (See App. B; see also App. A, opinion of Judge Kravitch).

Given this record, Judge Kravitch's dissent explained that the majority's analysis could not be sustained under the law of this Circuit or the Supreme Court's current eighth amendment jurisprudence. Bush v. Singletary, No. 89-4051 (11th Cir. March 30, 1993) (Kravitch, J., dissenting). Judge Kravitch's analysis of the relevant caselaw and its application to Mr. Bush's case directly establishes that the panel majority's decision is at odds with this Circuit's law. Her opinion speaks for itself with a clarity that would be disserved by an attempt at paraphrasing. Judge Kravitch's opinion is therefore appended to this petition and incorporated herein, and Appellant respectfully refers the Court to its analysis (App A).

B. Discussion

The panel majority opinion stands in conflict with the law this Circuit has consistently applied to resolve claims of ineffective assistance of counsel at capital sentencing. This case

involves an attorney who knew the trial judge was inclined to impose death irrespective of the jury's decision, but who nevertheless undertook little effort to develop evidence in mitigation and then presented none. Given the evidence at trial (see Procedural History, supra) and the jury's 7-5 vote, any effort by counsel to present mitigating evidence could have resulted in a life recommendation from the jury. See Blanco, 943 F.2d at 1505. Moreover, evidence such as that involved in this case (see App. C) would have established a "reasonable basis" for life as a matter of Florida law, thus protecting the jury's verdict against a judicial override. See Porter, supra. And, as a matter of its own law, this Circuit has held that mitigating factors such as those involved in this case establish that Appellant was prejudiced. See Blanco; Horton.

Without any presentation by counsel, however, the prosecutor was allowed to argue for death to the jury and judge because: "There has been no testimony concerning the character of the defendant other than the fact he was previously convicted of a serious crime" (ROA 1279). As Judge Kravitch explained, even "[t]aking into consideration any evidence or argument the state might conceivably have produced in rebuttal," Stephens, supra, Mr. Bush established deficient performance and prejudice under the law of this Circuit. Bush (Kravitch, J., dissenting) (App. A). That law, embodied in precedents such as Blanco, Horton, Cunningham, Stephens, Middleton, Porter, Harris, Magill, and Blake, cannot be squared with the panel majority's decision. Judge Kravitch's

dissent compellingly demonstrates why.

If this Circuit's law is to be altered to hold that any "tactic" asserted by counsel, irrespective of this Circuit's prior cases addressing similar circumstances, will insulate that lawyer against a claim of ineffective assistance of counsel, Appellant respectfully submits that the full Court should say so. Even under such a standard, Appellant's case remains a compelling one, for it is difficult to conceive of any attorney who would choose to put on nothing in mitigation (and thus to present no "reasonable basis for life") when he knows in advance that the judge is inclined to impose death regardless of the jury's decision. That is what counsel "chose" to do here. And he made that "choice" on the basis of an "investigation" that was far from adequate or reasonable. See Bush, (Kravitch, J., dissenting) (appended hereto at App. A).

The majority opinion changes the law of this Circuit. The majority opinion will affect future cases presenting claims of ineffective assistance of counsel at capital sentencing. This case warrants the granting of rehearing and en banc review in order for the conflicts between this decision and the decisions in cases such as Blanco, Horton, and the others identified above to be resolved and in order for the en banc Court to inform practitioners and subsequent panels of the standards under which they should operate when evaluating claims of ineffective assistance of counsel at capital sentencing.

(II)

THE CONFLICT WITH ENMUND, BULLOCK, AND TISON

A. Introduction

John Bush's statements "constitute the only known version of the events," Bush v. State, 461 So.2d 936, 937 (Fla. 1985), and were "to the effect that he did not realize that his accomplices, Alfonso Cave, 'Pig' Parker and Terry Johnson, were planning to rob the convenience store, and that during and after the robbery he was under their domination." Id. at 937-38. "[A]fter the robbery, they drove toward Indiantown, when his accomplices ordered him to stop. The victim was pushed out of the car and Bush avers that he intended to set her free. However, the accomplices decided that Slater might be able to identify them and they told Bush to dispose of her. Bush, not desiring to kill the victim, faked a blow at her with his knife and stabbed her superficially." Bush, 461 So.2d at 938. "[A]n accomplice, Parker, shot her." Id. The medical examiner confirmed that the stab wound was superficial and could not have caused death, and that Ms. Slater died as a result of the gunshot wound (R. 465, 471).

The eighth amendment does not permit "imposition of the death penalty on one ... who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." Enmund v. Florida, 458 U.S. 782, 797 (1982). Under Enmund, "[t]he focus must be on [the defendant's] culpability, not on that of [the accomplice] who ...

shot the [victim], for we insist on 'individualized consideration as a constitutional requirement in imposing the death penalty...'" Enmund, 458 U.S. at 798, relying on Lockett v. Ohio, 438 U.S. 586, 605 (1978), and Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

As in Enmund, so too in this case the Florida Supreme Court affirmed the death penalty in the absence of record proof that Mr. Bush "killed or attempted to kill, and regardless of whether he intended or contemplated that life would be taken." Enmund, 458 U.S. at 801. Such a finding would have contradicted the very facts found by the Florida Supreme Court in its recitation concerning what this record disclosed.

In Cabana v. Bullock, 474 U.S. 376 (1986), the Supreme Court further explained that the mental state finding required by Enmund must be made by the state courts. The Bullock Court also cautioned that federal reviewing courts were not to rely on or deem sufficient state court findings that the defendant a) was an active or major participant, and/or b) that there was "sufficient" evidence in the record from which a finding as to the defendant's culpability could be made. Cabana v. Bullock, 474 U.S. at 389-90. Enmund v. Florida, Cabana v. Bullock, and Tison v. Arizona (discussed below) require a finding of fact from the state courts as to the defendant's individual mental state, not a sufficiency determination -- i.e., not, as here, a ruling that participation in felonies can be deemed sufficient to constitute the intent required

by Enmund.[1]

In Tison v. Arizona, 107 S. Ct. 1676 (1987), the Supreme Court reiterated that a finding of major or active participation and contribution to the victim's death does not constitute the requisite finding of individual culpability. Tison, 107 S. Ct. at 1688. Tison held that the state courts must make a finding of intent or, at a minimum, "reckless indifference to human life" before the death penalty can satisfy the Enmund culpability requirement. Because the state courts had found major participation, see Tison, 1077 S. Ct. at 1688, ("The petitioner's own personal involvement in the crimes was not minor, but rather, as specifically found by the trial court, 'substantial'"), but not intent or "reckless indifference to human life," the Supreme Court, relying on Cabana v. Bullock, held:

> The Arizona courts have clearly found that the former [major or active participation] exists; we now vacate the judgments below and remand for determination of the latter [intent or reckless indifference to human life] in further proceedings not inconsistent with this opinion.

Tison v. Arizona, 107 S. Ct. at 1688.

As in Tison v. Arizona and Cabana v. Bullock, Mr. Bush's case involves a "sufficiency" ruling -- that there were actions which

---

[1] Thus, the Mississippi Supreme Court's express holdings that "[t]he evidence is overwhelming that [Bullock] was present, aiding and assisting in the assault upon, and slaying of [the decedent]," and that "[t]he evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon [the decedent]," Cabana v. Bullock, 474 U.S. at 389 (emphasis added), quoting Bullock v. State, 391 So.2d 601, 606, 614 (Miss. 1980), were deemed insufficient to establish the requisite findings of fact on individual culpability because they constituted only a finding of major participation. Bullock, 474 U.S. at 389-90.

contributed to the crime, Bush, 461 So.2d at 936 -- but is devoid of a state court finding of fact that Mr. Bush's intent was an intent to kill or that his mental state was one of reckless indifference to human life. As in Tison and Bullock, the ruling of the state courts in this case is at its essence a ruling that by "legal definition" Mr. Bush should be held responsible. See Bullock, 474 U.S. at 390.[2]

B. Discussion

To effectuate the eighth amendment principles embodied in Enmund, the Supreme Court has held that the state courts must expressly find at least that the defendant was a "major participant" and either intended to kill or had a "reckless indifference" to human life. Tison; Bullock. Participation and mental state findings are needed under Tison and Bullock.

Although acknowledging that the mental state finding was not made by the jury or Florida Supreme Court, see Bush (majority opinion), slip op. at 8-9, the panel majority ruled that a statement made by the trial judge when rejecting the statutory "accomplice whose participation was relatively minor" mitigating factor was sufficient. All that the judge's statement indicates, however, was that the judge was going to reject the mitigator because he believed Mr. Bush was a "participant". See Bush, slip

[2] See also Bullock, 474 U.S. at 389 (finding inadequate the state supreme court's findings that "[t]he evidence is overwhelming that appellant was present, aiding and assisting in the assault upon, and slaying of, Dickson" and that "[t]he evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon Mark Dickson.")

op. at 9 (quoting the statement). All that the judge found was the first part of the two-part finding which Tison and Bullock require.

Nowhere did the jury, Florida Supreme Court or trial judge find that Mr. Bush intended to kill, attempted to kill or was recklessly indifferent to human life. See, e.g., Bush (majority opinion), slip op. at 9 (quoting trial judge's statement); see also App. D (analyzing the state courts' rulings in this case in light of Enmund, Bullock and Tison). There is no express mental state finding ("intent"/"reckless indifference") from the jury, Florida Supreme Court or trial judge here. See App. D.

Bullock and Tison expressly hold that state court "sufficiency" determinations -- that as a matter of accomplice law the defendant should be held responsible -- are insufficient to meet the eighth amendment requirement of express findings of fact as to the defendant's mental state. In Appellant's case, the state courts' rulings involve no more than such a "sufficiency" determination. The panel's ruling is not in accord with the Supreme Court's precedent.

Appellant submits (complemented by the analysis included in App. D hereto) that the panel majority's decision is in conflict with the decisions of the United States Supreme Court in Enmund v. Florida, Cabana v. Bullock and Tison v. Arizona and that rehearing and review by the full Court are appropriate to maintain uniformity between the decisional law of this Circuit and the law of the United States Supreme Court.

CONCLUSION

On the basis of the foregoing, Appellant prays that the Court grant rehearing and en banc review.

Respectfully submitted,

Billy H. Nolas
Julie D. Naylor
Post Office Box 4905
Ocala, FL 34478-4905
(904) 620-0458

(Counsel for Petitioner/Appellant)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Celia A. Terenzio, Assistant Attorney General, Office of the Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299 this 4th day of June, 1993.

FOR BILLY H. NOLAS
Attorney
THOMAS H. DUNN

Attachment C

DEATH PENALTY

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-4051

JOHN EARL BUSH,

Petitioner-Appellant,

versus

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent-Appellee.

On Appeal from the United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: KRAVITCH, EDMONDSON and COX, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

Attachment D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG - 9 1993
MIGUEL J. CORTEZ
CLERK

NO. 89-4051

JOHN EARL BUSH,

Petitioner-Appellant,

versus

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

ORDER:

( ) The motion of appellant, John Earl Bush, for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of appellant, John Earl Bush, for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including October 18, 1993, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

Edward R. Cox
UNITED STATES CIRCUIT JUDGE

ORD-45

Attachment E

John Earl BUSH, Appellant,

v.

STATE of Florida, Appellee.

No. 62947.

Supreme Court of Florida.

Nov. 29, 1984.

Rehearing Denied Jan. 31, 1985.

Defendant was convicted of first-degree murder in the Circuit Court for Martin County, C. Pfeiffer Trowbridge, J., and was sentenced to death in accordance with jury's advisory sentence recommendation. Defendant appealed both conviction and sentence. The Supreme Court, Adkins, J., held that: (1) prosecutor's failure to inform defense of change in witness' testimony was not discovery violation and did not require either mistrial or *Richardson* inquiry; (2) defendant's confession given 11 hours after *Miranda* warning was admissible; (3) photographs of victim's dead body were admissible; (4) dismissal of prospective juror for cause was proper because of her attitude toward death penalty; and (5) prosecutor's plea for retribution in closing statement did not merit resentencing.

Affirmed.

Ehrlich, J., specially concurred and filed opinion, in which Alderman and Shaw, JJ., concurred.

Overton and McDonald, JJ., concurred in result only of the sentence.

1. Criminal Law ⇐627.8(6)

A *Richardson* inquiry by trial judge is necessary only when there is a discovery violation and an objection based on the alleged violation.

2. Criminal Law ⇐627.7(3)

Prosecutor's failure to inform defense that State's investigator would testify that witness identified defendant's photograph, when investigator's deposition stated that witness had not identified any photographs, was not a discovery violation, and therefore changed testimony neither constituted absolute legal necessity required for mistrial nor support for motion for *Richardson* inquiry.

3. Criminal Law ⇐517.2(3)

Confession by defendant accused of murder, given to police 11 hours after full recitation of *Miranda* warning, was admissible at trial, where defendant indicated at time of confession that he was giving statement voluntarily, that he had been read his rights previously, he understood those rights and was willing to voluntarily deliver information.

4. Criminal Law ⇐412.2(5)

There is no requirement that an accused be continually reminded of his rights once he has intelligently waived them.

5. Criminal Law ⇐517.1(1)

A confession, in order to be admissible, must be the product of a rational intellect and free will.

6. Criminal Law ⇐520(2)

Voluntariness of confession was not vitiated by implied suggestion by investigating officers that defendant would benefit if he confessed, since statements made to defendant did not overcome his will and produce confession.

7. Criminal Law ⇐438(6)

Photographs are admissible where they assist medical examiner in explaining to jury nature and manner in which wounds were inflicted.

8. Criminal Law ⇐438(6)

Allegedly gruesome and inflammatory photographs of victim's body, which were used to assist medical examiner in explaining external examination of victim, were admissible in murder trial, notwithstanding potential for swaying jury during sentencing phase, where photographs were not so shocking as to defeat value of their relevancy.

9. Jury ⇐108

Exclusion of potential juror for cause was proper in murder trial, where juror's attitude towards death penalty would have prevented her from rendering impartial decision.

10. Homicide ⇐142(8)

Indictment charging premeditated murder permits state to proceed on either theory of premeditated murder or felony-murder.

11. Homicide ⇐337

Defendant was not prejudiced in murder trial by not knowing whether State would proceed on theory of premeditated murder or felony-murder.

12. Homicide ⇐341

Where jury found defendant guilty of both kidnapping and robbery, in addition to first-degree murder, failure to instruct on third-degree murder was at most harmless error. West's F.S.A. § 782.04(4).

13. Criminal Law ⇐1172.9

Judge's statement in murder trial to the effect that sentencing decision required majority vote of jury was not prejudicial error, where body of jury instruction was correct, there was no objection or modification suggested, and jury was apparently not confused by partially inconsistent instruction.

14. Homicide ⇐311

Instruction during sentencing phase of murder trial that sentence of death could not be imposed absent intent to kill or contemplation that life would be taken was not required, where facts were sufficient to support finding that defendant's involvement constituted required intent or contemplation.

15. Criminal Law ⇐996(1.1)

Appeal for retribution in prosecutor's closing statement in murder trial was of minor impact and did not merit resentencing, notwithstanding the fact that jury vote was seven to five in favor of imposing death penalty and six to six vote would have precluded sentence of death.

16. Criminal Law ⇐1171.1(1)

Supreme Court will automatically reverse for resentencing only when clear prosecutorial abuse exists.

Martha C. Warner of the Law Offices of Martha C. Warner, Stuart, for appellant.

Jim Smith, Atty. Gen., and Russell S. Bohn, Asst. Atty. Gen., West Palm Beach, for appellee.

ADKINS, Justice.

John Earl Bush was convicted of the first-degree murder of Frances Slater. The trial judge imposed the death penalty in accordance with the jury's advisory sentence recommendation. Bush appeals from the conviction and the sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const. Having reviewed the record and considered the issues presented on appeal, we find no reversible error and affirm Bush's conviction and sentence.

The evidence at trial demonstrated the following events. At 3:00 a.m. on April 27, 1982, Frances Slater was abducted from the convenience store where she worked. Incident to the kidnapping, the store's cash register and floor safe were robbed of approximately $134. Later that day, the victim's body was discovered thirteen miles from the store. She had a stab wound in her abdomen and had been shot once in the back of her head at close range.

At trial, a delivery person for the local newspaper testified that she was passing by the store between 2:30 and 3:00 a.m., and saw a car in the parking lot occupied by one black man.

Inside the store were two black men with another person. In a photo lineup, she identified Bush's car and identified Bush as being one of the men in the store.

Four taped statements given by Bush were played during the trial. These constitute the only known version of the events and are presented by Bush in the light most favorable to him. His statements are to the effect that he did not realize that his accomplices, Alfonso Cave, "Pig" Parker

and Terry Johnson, were planning to rob the convenience store, and that during and after the robbery he was under their domination. Bush states that after the robbery, they drove toward Indiantown, when his accomplices ordered him to stop. The victim was pushed out of the car and Bush avers that he intended to set her free. However, the accomplices decided that Slater might be able to identify them and they told Bush to dispose of her. Bush, not desiring to kill the victim, faked a blow at her with his knife and stabbed her superficially. Slater fell to the ground and an accomplice, Parker, shot her.

The jury returned a verdict of guilty on the charges of first-degree murder, robbery with a firearm, and kidnapping. Subsequent to the sentencing hearing, the jury recommended, in a 7-5 advisory sentence, that the death penalty be imposed. The trial judge, citing three aggravating factors and no mitigating factors, sentenced Bush to death.

CONVICTION

On appeal Bush raises ten points which will be addressed in order of their presentation. In the first point on appeal, Bush contends that the trial judge should have conducted an inquiry, as in *Richardson v. State*, 246 So.2d 771 (Fla.1971), or granted a mistrial because a state investigator's testimony contradicted his earlier deposition. This argument is without merit.

[1, 2] A *Richardson* inquiry is necessary only when there is a discovery violation and an objection based on the alleged violation. *Richardson*, 246 So.2d at 774; *Lucas v. State*, 376 So.2d 1149, 1151 (Fla. 1979). In the instant case, investigator Forte stated in his deposition that Charlotte Grey, a clerk from a nearby convenience store which had been visited by Bush had not identified any photographs. At trial, Forte testified that witness Grey did identify Bush's photograph during the photo lineup. He explained that the inconsistency arose from defense counsel having asked two different questions. The prosecutor's failure to inform the defense of this change of testimony is not a discovery violation and does not constitute the absolute legal necessity required for a mistrial. *See Dunn v. State*, 341 So.2d 806, 807 (Fla. 3d DCA 1977).

When testimonial discrepancies appear, the witness' trial and deposition testimony can be laid side-by-side for the jury to consider. This would serve to discredit the witness and should be favorable to the defense. Therefore, unlike failure to name a witness, changed testimony does not rise to the level of a discovery violation and will not support a motion for a *Richardson* inquiry.

In his second point on appeal Bush argues that his confessions were inadmissible because they were procured through improper influence and without full benefit of the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). On the morning of May 4, 1982, Bush went to the Martin County Sheriff's Department to inquire about his car, which had been confiscated pursuant to a search warrant. He was fully advised of his rights, executed a waiver, then attempted to establish an alibi for the night of the murder.

The deputy sheriffs requested him to accompany them to West Palm Beach to substantiate the alibi. He was not under arrest and was free to refuse the request. Instead, Bush accompanied two officers to West Palm Beach to the house where Bush said they could meet a witness who would support his alibi.

When it became clear that the alibi witness would not appear, Bush told the officers that they did not have to wait any longer because the witness would not be able to help him. Bush then proceeded, in this second statement, to admit complicity in the crime. At the beginning of questioning, the officer asked Bush if he was giving the statement voluntarily, if he had been read his rights previously, if he understood those rights and was willing to voluntarily deliver the information. He responded affirmatively to each question.

[3, 4] Bush claims that this second statement was made without benefit of a *Miranda* warning. We do not agree. Although it had been eleven hours since the full recitation of his rights, Bush stated that he was aware of his rights and desired to waive those rights. There is no requirement that an accused be continually reminded of his rights once he has intelligently waived them. *Biddy v. Diamond*, 516 F.2d 118, 122 (5th Cir.1975), *cert. denied*, 425 U.S. 950, 96 S.Ct. 1724, 48 L.Ed.2d 194 (1976); *Lucas v. State*, 335 So.2d 566 (Fla. 1st DCA 1976).

[5, 6] Bush also contends that the voluntariness of his statements was vitiated by the implied suggestion by the investigating officers that he would benefit if he confessed. This Court has stated that although a police interrogator must neither abuse a suspect nor seek to obtain a statement by coercion or inducement, the interrogator's job is to gain as much information about the alleged crime as possible without violating the suspect's constitutional rights. *Stevens v. State*, 419 So.2d 1058, 1063 (Fla.1982). The confession must be the product of a rational intellect and free will. *Townshend v. Sain*, 372 U.S. 293, 307, 83 S.Ct. 745, 754, 9 L.Ed.2d 770 (1963). In addition, we have previously held that a confession is not rendered inadmissible because the police tell the accused that it would be easier on him if he told the truth. *Paramore v. State*, 229 So.2d 855, 858 (Fla. 1969).

On this point, the instant case is essentially similar to *La Rocca v. State*, 401 So.2d 866, 868 (Fla. 3d DCA 1981), where police statements that minimized the defendant's action were held not to be coercive. Under the totality of the circumstances, the statements made to Bush did not overcome his will and produce the confession. More likely, it was Bush's realization that he had failed to substantiate an alibi which caused him to confess and thereby admit a more favorable participation in the murder.

Bush's third point on appeal contests the admission of certain photographs which he states were inflammatory and prejudicial. Exhibit fifteen, a blowup of the victim's bloody face, was taken at the morgue and admitted solely to identify Frances Slater. Exhibit twenty-one was a close-up of the gunshot wound to the victim's head.

[7, 8] The test of admissibility of photographs in situations such as this is relevancy and not necessity. Photographs are admissible where they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted. *Welty v. State*, 402 So.2d 1159, 1163 (Fla.1981); *Bauldree v. State*, 284 So.2d 196, 197 (Fla.1973). In the instant case, exhibit twenty-one was used in order to assist the medical examiner in explaining the external examination of the victim. This exhibit was clearly admissible as an aid in illustrating to the jury what the examiner observed during his examination. Exhibit fifteen, though taken away from the scene, is treated no differently than exhibit twenty-one. We have repeatedly stated that:

> [T]he current position of this Court is that allegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in a case. Relevancy is to be determined in the normal manner, that is, without regard to any special characterization of the proffered evidence. Under this conception, the issues of "whether cumulative", or "*whether photographed away from the scene,*" are routine issues basic to a determination of relevancy, and not issues arising from any "exceptional nature" of the proffered evidence.

State v. Wright, 265 So.2d 361, 362 (Fla. 1972) (emphasis supplied). *See Henninger v. State*, 251 So.2d 862, 864 (Fla.1971); and *Meeks v. State*, 339 So.2d 186 (Fla.1976). Bush argues that exhibit fifteen was unduly prejudicial because it was gruesome and may have made a crucial difference in the jury's recommendation in this case. In *Williams v. State*, 228 So.2d 377 (Fla.1969), this Court noted that similarly gruesome photographs depicted a view which was "neither gory nor inflammatory beyond the

simple fact that no photograph of a dead body is pleasant." *Id.* at 379. The same rationale applies here, notwithstanding the potential for swaying the jury during the sentencing phase. We require only that the photograph not be so shocking in nature that it defeats the value of its relevancy. *Id.* These pictures were admissible.

[9] In point four, Bush argues that the trial court erred in excluding a potential juror on a challenge for cause. He cites *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and *Lockett v. Ohio* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), for the proposition that jury veniremen may be excluded only if they demonstrate an "unmistakeably clear" attitude toward the death penalty which would prevent them from making an impartial decision as to the defendant's guilt. *See also Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

The following constitutes the pertinent portion of the statements of the juror excluded in this case:

Prosecutor: "Do you know of any reason why anything outside might come into it, other than what you hear here?"

Juror: "I don't know if I could take the responsibility of committing one to death. I just don't know if I could handle that."

Prosecutor: "Let me point out two things to you. First, your sentence is only advisory. The final decision, responsibility and burden lies with His Honor, the Judge ... Would that in any way cause you to change your opinion as to whether or not you could?"

Juror: "I just don't think I could handle the responsibility of condemning somebody. I think it's up to God."

Prosecutor: "And you feel like that would affect you even in the first stage, in determining the guilt or the innocence, knowing if you rendered a verdict of guilty of murder in the first degree that the man could be put to death, you feel that it could affect you?"

Juror: "I feel it would be a problem for me, myself, in my heart."

Defense Counsel: "I understand, of course, sympathy will enter into practically any case .... It's not anything that is unique to this case or any particular type of case. Do you understand that? How would you feel about it with that in mind?"

Juror: "I don't know. It would just be a very difficult thing to do."

Defense counsel: "Do you think you could do it, put sympathy out of your mind and base your verdict on the law and the evidence?"

Juror: "No, I don't think so."

We do not think that it was error to excuse the juror. This juror's attitude toward the death penalty is firmly grounded and would clearly prevent her from rendering an impartial decision.

[10, 11] In point five, Bush argues that our decision in *Knight v. State*, 338 So.2d 201 (Fla.1976), should be narrowed or distinguished because of the facts of this case. *Knight* held that an indictment charging premeditated murder would permit the state to proceed on either the theory of premeditated murder or felony murder. Bush claims that since he did not, in fact, commit the actual murder, *Knight* is inapplicable. We disagree. Whether or not Bush committed the actual murder is for the jury to determine. The jury could have decided that Bush was guilty of premeditated murder, or the jury could have convicted based upon the felony murder. In either case, *Knight* is applicable and Bush was not prejudiced by not knowing the specific theory upon which the state would proceed. *Sec O'Callaghan v. State*, 429 So.2d 691, 695 (Fla.1983); *State v. Pinder*, 375 So.2d 836, 839 (Fla.1979).

[12] Bush argues in point six that the trial court's rejection of a third-degree murder instruction was prejudicial error. We disagree. Third-degree murder is defined as "the unlawful killing of a human being, when perpetrated without any design to affect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony *other than*, ... robbery ... [or] kidnapping ...." Section 782.04(4), Florida Statutes (1981) (emphasis supplied). Since the jury found Bush guilty of both kidnapping and robbery, failure to instruct on third-degree murder is at most harmless. *See also State v. Abreau*, 363 So.2d 1063, 1064 (Fla.1978).

SENTENCING

In point seven Bush raises a variety of objections relative to the constitutionality of the Florida capital sentencing statute. Each of his contentions has been previously addressed and we do not deem it necessary to revisit them. *See e.g., Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913 (1976).

[13] In Bush's eighth point on appeal he challenges the trial judge's "repeated" instructions to the jury that a sentencing decision requires a majority. We have held that such an instruction is erroneous. *Harich v. State*, 437 So.2d 1082, 1086 (Fla. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984).

Here, although the jury charge contained some objectionable statements, the trial judge explicitly corrected himself by explaining: "if by *six* or more votes the jury determines that [Bush] should not be sentenced to death, your advisory sentence will be [imposition of a life sentence.]" (Emphasis supplied.) As in *Harich*, it affirmatively appears that the jury was not confused by the partial inconsistency of the instruction. Since the body of the instruction was correct and there was no objection or modification suggested, we find no prejudicial error.

[14] Bush argues in his ninth point on appeal that the trial judge should have instructed the jury during the sentencing phase that a sentence of death may not be imposed absent intent to kill or contemplation that life would be taken. In support, Bush cites *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), which held that proof of intent to kill or contemplation of death is a necessary prerequisite to imposition of the death penalty. 458 U.S. at 794, 102 S.Ct. at 3375. Bush claims that failure to give this specific instruction to the jury may have resulted in a death sentence simply because the jurors believed Bush to be a "bad fellow."

We disagree with this contention on the facts of this case. Here, we do not have a mere passive aider and abettor as in *Enmund*, where the only participation by Enmund was as driver of the getaway car from what he supposed was only a robbery and not a murder. The facts of this case show that Bush was a major, active participant in the convenience store robbery and his direct actions contributed to the death of the victim. The degree of Bush's participation is sufficient to support a finding that his involvement constituted the intent or contemplation required by *Enmund*.

[15] Bush raises numerous issues in point ten, only one of which merits our discussion. He argues that during the sentencing phase the prosecutor made an appeal for sympathy and revenge for the family of the victim in the following statement to the jury:

> "I ask you, don't consider the sympathy that Mr. and Mrs. Campbell have. Don't consider that when Mr. and Mrs. Campbell sit down to Thanksgiving dinner just three days from now that they are going to look across the table and they are going to look at Cathy and they are going to see Frances Julia Slater, the identical twin sister. If sympathy had any part of it, think of what they go through. And every time they sit down and look at her, this whole incident is going to come back ..."

Bush contends that this appeal for retribution was devastating inasmuch as the jury vote was 7–5 in favor of imposing the death penalty. We disagree. We have previously held that although "the rule against inflammatory and abusive argument by a state's attorney is clear, each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements are made ...." *Darden v. State*, 329 So.2d 287, 291 (Fla. 1976), *cert. dismissed*, 430 U.S. 704, 97 S.Ct. 1671, 51 L.Ed.2d 751 (1977).

In *Darden*, for example, the state continuously referred to the defendant as an

animal and played upon the necessity of restraining him permanently. We held that within the context of the argument, that reference to the defendant did not constitute prejudice requiring a new sentencing hearing. The instant case is not unlike *Darden*. We find that the above appeal to the jury's sympathies was of minor impact and does not merit re-sentencing. The statements are not a clear abuse, nor do they rise to the magnitude of a denial of fundamental fairness.

[16] *Teffeteller v. State*, 439 So.2d 840 (Fla.1983), is not inapposite. There, we stated:

> Comments of counsel during the course of a trial are controllable in the discretion of the trial court, and an appellate court will not overturn the exercise of such discretion unless a clear abuse has been made to appear. *Paramore v. State*, 229 So.2d 855 (Fla.1969), *vacated*, 408 U.S. 935 [92 S.Ct. 2857, 33 L.Ed.2d 751] (1972).

Id. at 845. Only where clear prosecutorial abuse exists will we automatically reverse for resentencing. *Teffeteller*, 439 So.2d at 845. Here, we cannot say that the "line was clearly drawn too far" as in *Teffeteller*. *Id.*

Bush's convictions and sentences are affirmed.

It is so ordered.

BOYD, C.J., and ALDERMAN and SHAW, JJ., concur.

EHRLICH, J., concurs in conviction and specially concurs with an opinion of the sentence, in which ALDERMAN and SHAW, JJ., concur.

OVERTON and McDONALD, JJ., concur in the conviction, but concur in result only of the sentence.

EHRLICH, Justice, specially concurring.

I am in complete agreement with the majority, but I write separately to address a problem arising with increasing frequency in criminal cases, namely, prosecutorial misconduct in unfairly enflaming the jury's emotions in closing argument. On the facts of this case, it is clear that the prosecutor's description of the ongoing suffering of the victim's family did not fundamentally prejudice the defendant so as to require a new sentencing procedure. It is equally clear that the argument was irrelevant and improper.

Section 921.141, Florida Statutes, sets forth those factors which may be presented to a jury in support of the prosecution's request for a recommendation of death. The suffering of the survivors is not relevant to any of the factors listed. The purpose of the death penalty statute as now drafted is to insulate its application from emotionalism and caprice. This Court has long condemned prosecutorial arguments which appeal to emotion rather than to reason. *See, e.g., Teffeteller v. State*, 439 So.2d 840 (Fla.1983), *Singer v. State*, 109 So.2d 7 (Fla.1959); *Clinton v. State*, 53 Fla. 98, 43 So. 312 (1907). I can think of few arguments which are more calculated to arouse an intense emotional response in a jury than the graphic portrayal of the survivors' bereavement. I can imagine no set of facts on which this would be proper argument.

Unfortunately, in spite of the clear teaching of this and other courts that such argument is improper, prosecutors continue to indulge in it. This is contrary to the ethics of the profession generally and in violation of the duty, as *state* attorneys, to seek justice, not merely convictions. Zealous representation of society's interest does not require society's advocate to overstep the bounds of professional restraint. Our holding that, in this case, the improper argument does not require a new sentencing trial must not be seen as our condoning such impropriety. Continued flouting of ethical limitations of prosecutorial conduct can be corrected through professional discipline without burdening society at large or the criminal justice system with the cost of retrying the case.

ALDERMAN and SHAW, JJ., concur.

Attachment F

Courtney J. VAN RIPER, Petitioner,

v.

STATE of Florida, Respondent.

No. 68457.

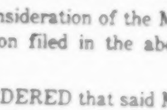
Supreme Court of Florida.

Feb. 19, 1987.

Prior report: 492 So.2d 1336.

Upon consideration of the Motion for Reconsideration filed in the above cause by petitioner,

IT IS ORDERED that said Motion be and the same is hereby denied.



John Earl BUSH, Petitioner,

v.

Louie L. WAINWRIGHT, Respondent.

John Earl BUSH, Appellant,

v.

STATE of Florida, Appellee.

Nos. 68617, 68619.

Supreme Court of Florida.

Feb. 26, 1987.

Rehearing Denied May 8, 1987.

Original proceeding in habeas corpus was combined with appeal from the Circuit Court, in and for Martin County, C. Pfeiffer Trowbridge, C.J., denying postconviction relief. The Supreme Court held that: (1) trial counsel's failure to use psychiatrist in compiling evidence of defendant's mental incompetency, failure to file number of pretrial suppression motions, and failure to object to certain aspects of proceedings at several stages of trial did not constitute ineffective assistance of counsel; (2) numerous psychological problems, such as learning disabilities, passive and dependent personality, and possible diffuse organic brain damage did not, when taken together sufficiently raise valid question as to defendant's competency to stand trial; and (3) appellate counsel's failure to raise alleged unconstitutionality of lineup identification obtained in absence of defense counsel after arraignment did not constitute ineffective assistance of appellate counsel.

Affirmed, petition for writ of habeas corpus denied, previously granted stay of execution vacated.

Barkett J., concurred specially with opinion.

1. Criminal Law ⇐998(3, 13)

Claims which were or could have been considered under direct appeal were barred from consideration on motion for postconviction relief.

2. Criminal Law ⇐998(6)

Learning disabilities, passive and dependent personality, and possible diffuse organic brain damage did not, when taken together, sufficiently raise valid question as to postconviction petitioner's competency to stand trial.

3. Criminal Law ⇐641.13(2, 6)

Trial counsel was not ineffective in failing to use psychiatrist in compiling evidence of defendant's mental incompetency, failing to file number of pretrial suppression motions, and failing to object to certain aspects of proceedings at several stages of trial; errors involved either strategies which would have been unsupported by record or actions pursued following sound strategies of defense. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐641.13(1)

Fact that trial strategies resulted in conviction augurs no ineffectiveness of counsel. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐641.13(7)

Appellate counsel's failure to raise alleged unconstitutionality of lineup identification obtained in absence of defense counsel after arraignment did not constitute ineffective assistance of counsel; identification served only to link defendant to crime, and link had already been established by defendant's admission. U.S.C.A. Const.Amend. 6.

Larry Helm Spalding, Capital Collateral Representative Mark E. Olive, Litigation Director and Billy H. Nolas, Staff Atty., Office of Capital Collateral Representative, Tallahassee, for petitioner/appellant.

Robert A. Butterworth, Atty. Gen., and Richard G. Bartmon, Asst. Atty. Gen., West Palm Beach, for respondent/appellee.

PER CURIAM.

John Earl Bush, a day before his scheduled execution on April 22, 1986, filed in the circuit court a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850 and a motion for stay of execution, and in this Court filed a petition for a writ of habeas corpus and a stay of execution. The circuit court denied all relief without an evidentiary hearing. This Court granted a stay of execution on April 21 in order to allow a careful review and consideration of certain claims raised in Bush's appeal of the circuit court's denial of his 3.850 motion and his petition for habeas corpus. We have exercised our jurisdiction under article V, section 3(b)(1) and (9), Florida Constitution, and now find Bush entitled to no relief.

Bush was convicted in November, 1982 of first-degree murder, armed robbery, and kidnapping. A jury recommended the imposition of a sentence of death, and Bush was so sentenced. We affirmed the conviction and sentence in *Bush v. State*, 461 So.2d 936 (Fla.1984), *cert. denied*, — U.S. —, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986). On March 20, 1986, the governor signed a warrant authorizing Bush's execution, and Bush sought relief in the circuit court.

[1] We shall first examine the claims raised in the 3.850 motion. Of the seven claims raised therein, the last four either were or could have been considered on direct appeal and are therefore now barred from consideration. *Porter v. State*, 478 So.2d 33 (Fla.1985); *O'Callaghan v. State*, 461 So.2d 1354 (Fla.1984). We now examine 1) whether Bush was prejudiced by a "professionally inadequate" psychiatric evaluation which failed to disclose his alleged incompetency to stand trial, 2) whether Bush was in fact tried while incompetent, and 3) whether counsel at trial rendered ineffective assistance within the terms of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The first two issues raised above must fall together, as each lacks a crucial foundation in fact—any indication of Bush's incompetency to stand trial. Before trial below, the defense moved for the appointment of a psychiatric expert in order to evaluate the defendant's competency and the possible applicability of any mitigating factors. After consulting with the defense, the expert and counsel concluded that further examination would produce no useful information. We cannot find error in this tactical consensus reached by those parties most intimately involved with Bush and his defense. Since defense counsel was bound to seek out such expert testimony only if evidence existed calling into question Bush's sanity, *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); *Christopher v. State*, 416 So.2d 450 (Fla. 1982), we cannot now find fault in counsel's decision as to the futility of pursuing the incompetency claim. As noted by the United States Supreme Court in *Ake*, "[a] defendant's mental condition is not necessarily at issue in every criminal proceeding." 105 S.Ct. at 1096.

[2] We find no error under the circumstances of this case. Absolutely no evidence existed at the time of trial that Bush lacked "sufficient present ability to consult with and aid his attorney in the preparation of a defense with a reasonable degree of understanding." *Ferguson v. State*, 417 So.2d 631, 634 (Fla.1982). A review of the original record reflects no evidence that Bush was incompetent to stand trial. Further, the long psychiatric history indicating incompetency pointed to in *Jones v. State*, 478 So.2d 346 (Fla.1985), and *Hill v. State*, 473 So.2d 1253 (Fla.1985), is absent in this case, and the report prepared by a newly

appointed psychiatric expert offers only weak support to Bush's claims. The numerous psychological problems now pointed out, such as learning disabilities, a passive and dependent personality, and possible "diffuse organic brain damage" do not, when taken together, sufficiently raise a valid question as to Bush's competency to stand trial. *See James v. State*, 489 So.2d 737 (Fla.) *cert. denied*, — U.S. —, 106 S.Ct. 3285, 91 L.Ed.2d 574 (1986). We therefore reject the first two claims.

[3, 4] In turning to the claim of ineffective assistance of trial counsel, we scrutinize the alleged inadequacies under the test set forth in *Strickland*. Bush alleges that counsel was ineffective in, *inter alia*, failing to use the psychiatrist in compiling evidence of the defendant's mental incompetency, failing to file a number of pre-trial suppression motions, and failing to object to certain aspects of the proceedings at several stages of the trial. The test is set forth as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

104 S.Ct. at 2064. Upon careful review, we determine that none of the alleged omissions in this case fall "outside the wide range of professionally competent assistance." *Id.* at 2066. The claimed errors of counsel involve either strategies which would have been unsupported by the record, such as the mental incompetency claim disposed of above, or actions pursued following sound strategies of the defense. The fact that these strategies resulted in a conviction augurs no ineffectiveness of counsel. *Songer v. State*, 419 So.2d 1044 (Fla.1982). In sum, we find no deficient performance prejudicing Bush, *Knight v. State*, 394 So.2d 997 (Fla.1981), and so reject this claim.

[5] Finally, we turn to the claim of ineffective assistance of appellate counsel raised in Bush's petition for a writ of habeas corpus. Prejudice resulted, it is argued, when appellate counsel failed to raise the alleged unconstitutionality of a lineup identification obtained in the absence of defense counsel after arraignment.

In *Knight*, we required a showing that the alleged deficiency, "considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings." 394 So.2d at 1001. No such prejudice exists when the argument is considered in light of the case's facts.

Bush never contested his participation in the crime, only the extent and nature of his involvement. Because the identification served only to link him to the crime, and this link had already been established by his admission, suppression of the lineup identification would not have materially aided his defense. We can perceive no ineffectiveness in appellate counsel's declining to dilute any more valid issues upon appeal by advocating this tangential point which, even if accepted, would not change the result in the case.

Finding no basis for relief in Bush's motions for post-conviction relief, we affirm the trial court's denial of his 3.850 motion to vacate the judgment and sentences and deny the petition for writ of habeas corpus. The previously granted stay of execution is vacated.

It is so ordered.

McDONALD, C.J., OVERTON, EHRLICH and SHAW, JJ., and ADKINS, J. (Ret.), concur.

BARKETT, J., concurs specially with an opinion.

BARKETT, Justice, concurring specially.

I concur in the majority's denial of habeas corpus relief.

I concur in result only in the majority's affirmance of the trial court's summary denial of defendant's motion under Rule 3.850. While I agree that most of the issues raised were not cognizable on a motion for post-conviction relief, I do not agree with the majority's treatment of Bush's claims of ineffective assistance of counsel and incompetency at the time of trial.

There are only three possible dispositions available to a trial judge in ruling on a 3.850 motion: (1) The judge may deny the motion because it is insufficient as a matter of law to support the defendant's claims; (2) The judge may deny the motion if the claims are conclusively refuted by the record, but must attach those portions of the record which conclusively refute the allegations; (3) The judge *must* grant an evidentiary hearing to resolve any legitimate factual claims that are not conclusively refuted by the record.

In this case, I do not believe the defendant has met his burden of alleging facts which would support a claim for relief. Bush's allegations of ineffective assistance of counsel do not meet the standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), nor are there sufficient allegations to support the claim of incompetency. At best, Bush alleges that an expert would testify that based upon a current evaluation "Bush's borderline scores in regard to intellectual functioning as well as his apparent learning disability would indicate a *possibility* of incompetence during the time of his trial." This falls short, in my view, of adequately raising the factual question of Bush's incompetency to stand trial, and therefore the motion was correctly denied as a matter of law. *See James v. State*, 489 So.2d 737 (Fla.), *cert. denied*, — U.S. —, 106 S.Ct. 3285, 91 L.Ed.2d 574 (1986).

My reasons for departing from the majority's analysis are threefold. By making "findings of fact" from a "review of the record," the majority suggests that sufficient factual allegations were contained in the motion and that in the face of adequately pled factual allegations this Court should "suspend" the requirements of Rule 3.850 to either append the pertinent portions of the record or grant an evidentiary hearing.

First, as I previously stated, I do not think this case involves that portion of the rule which pertains to the necessity for factual findings either from the record or from an evidentiary hearing.

Second, if this *were* a case which presented any legitimate factual issues, they should be resolved by the trial court. I cannot fault reviewing the record as an extra precaution when the motion does not require it. However, when the motion does require looking at the record, appellate review should not serve as a substitute for the trial court's initial review. I do not believe that as a reviewing court, we should arrogate the function of fact-finding.

Lastly, in reviewing a record a court cannot reach conclusions unsupported by that record. In this instance, the majority did so. To cite but one example, the majority finds that:

> After consulting with the defense, the expert and counsel concluded that further examination would produce no useful information.

There was no evidentiary hearing in this case. Neither trial counsel nor the psychiatric expert consulted by defense counsel presented any testimony. I am at a loss as to how the majority could possibly have reached this factual conclusion.

Because I believe Bush's allegations to be legally insufficient, the trial judge correctly denied Bush's motion for post-conviction relief. However, when the allegations *are* legally sufficient to create a factual dispute, I believe trial courts should resolve such disputes either from the record or from an evidentiary hearing. Reviewing courts should then review trial court decisions under the clearly established standards of appellate review.

Attachment G

significant mitigator); *Rembert v. State*, 445 So.2d 337 (Fla.1984) (one aggravator, considerable mitigating evidence).

[11] The remaining points raised by Young are without merit. Contrary to his contention, trial courts may rely on presentence investigation (PSI) reports. *Engle v. State*, 438 So.2d 803 (Fla.1983), *cert. denied*, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 753 (1984). The court used evidence of Young's prior adult convictions in sentencing him on the burglary conviction, not the first-degree murder conviction. Moreover, the judge stated that he would not rely on any victim impact evidence contained in the PSI or on Young's juvenile record. The record indicates that the court did, in fact, ignore that material.

[12] Young claims that the court improperly excused seventeen death-scrupled prospective jurors, but identifies only three of those persons. He also argues that the court improperly refused his challenge against a woman he claims would automatically vote for death. The competency of a juror is a mixed question of law and fact to be decided within a trial court's discretion. *Davis v. State*, 461 So.2d 67 (Fla.1984), *cert. denied*, 473 U.S. 913, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985). "Manifest error must be shown before a trial court's ruling will be disturbed on appeal." *Id.* at 70. Our review of the record discloses no such error.

Finally, Young's challenges to the constitutionality and validity of Florida's death penalty statute have been rejected previously. *E.g., Van Poyck v. State*, 564 So.2d 1066 (Fla.1990).

There being no reversible error, we affirm Young's conviction of first-degree murder and sentence of death.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, GRIMES and KOGAN, JJ., concur.

BARKETT, J., concurs in result only.

John Earl BUSH, Petitioner,

v.

Richard L. DUGGER, etc., Respondent.

No. 76577.

Supreme Court of Florida.

March 28, 1991.

Rehearing Denied June 12, 1991.

Following affirmance of first-degree murder conviction and death sentence, 461 So.2d 936, defendant petitioned for writ of habeas corpus. The Supreme Court held that prosecutor's comment during penalty phase about how family would miss victim during upcoming holiday was improper but did not warrant relief.

Petition denied.

1. Habeas Corpus ⇐296, 505

Claims of error with respect to victim impact statements during penalty phase of murder prosecution are generally not cognizable in habeas corpus proceeding, but such a claim would be considered where Supreme Court did not have benefit of United States Supreme Court decisions on the issue when it considered the case on direct appeal.

2. Criminal Law ⇐723(1)
Habeas Corpus ⇐497

Prosecutor's comment during penalty phase of first-degree murder prosecution, about how victim's family would miss her during upcoming holiday, was improper victim impact statement, but did not warrant habeas corpus relief since it was only a single comment which did not impermissibly emphasize victim's personal qualities or the family's opinions and characterizations of the crime. U.S.C.A. Const.Amend. 8.

3. Habeas Corpus ⇐296

Habeas corpus petitioner's claim that aggravating factor was improperly applied

in imposing death sentence was procedurally barred where the claim was raised on direct appeal.

4. Habeas Corpus ⇐275

Habeas corpus petitioner's claim of instructional error was procedurally barred where no objection was made to instructions at trial.

Larry Helm Spalding, Capital Collateral Representative, Billy H. Nolas, Chief Asst. CCR, and Gail Anderson, Staff Atty., Office of the Capital Collateral Representative, Tallahassee, for petitioner.

Robert A. Butterworth, Atty. Gen., and Celia A. Terenzio, Asst. Atty. Gen., West Palm Beach, for respondent.

PER CURIAM.

John Earl Bush, who is sentenced to death, petitions this Court for a writ of habeas corpus. Bush was convicted of the 1982 first-degree murder of Frances Slater. We have affirmed that conviction and the sentence of death in *Bush v. State*, 461 So.2d 936 (Fla.1984), *cert. denied*, 475 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986), and have subsequently denied an appeal from a rule 3.850 [1] motion and a first petition for a writ of habeas corpus. *Bush v. Wainwright*, 505 So.2d 409 (Fla.), *cert. denied*, 484 U.S. 873, 108 S.Ct. 209, 98 L.Ed.2d 160 (1987). We have jurisdiction under article V, sections 3(b)(1) and (9) of the Florida Constitution.

[1] Bush raised four claims in this petition. First, he argues that the prosecutor committed reversible error in the closing argument during the penalty phase and that he is entitled to relief under the United States Supreme Court's decisions in *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989). Bush's attorney objected to the argument and raised the issue on appeal. In that decision this Court stated:

> [Bush] argues that during the sentencing phase the prosecutor made an appeal for sympathy and revenge for the family of the victim in the following statement to the jury:
>
> "I ask you, don't consider the sympathy that Mr. and Mrs. Campbell have. Don't consider that when Mr. and Mrs. Campbell sit down to Thanksgiving dinner just three days from now that they are going to look across the table and they are going to look at Cathy and they are going to see Frances Julia Slater, the identical twin sister. If sympathy had any part of it, think of what they go through. And every time they sit down and look at her, this whole incident is going to come back . . ."
>
> Bush contends that this appeal for retribution was devastating inasmuch as the jury vote was 7–5 in favor of imposing the death penalty. We disagree. We have previously held that although "the rule against inflammatory and abusive argument by a state's attorney is clear, each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements are made...." *Darden v. State*, 329 So.2d 287, 291 (Fla.1976), *cert. dismissed*, 430 U.S. 704, 97 S.Ct. 1671, 51 L.Ed.2d 751 (1977).
>
> .... We find that the above appeal to the jury's sympathies was of minor impact and does not merit resentencing. The statements are not a clear abuse, nor do they rise to the magnitude of a denial of fundamental fairness.

Bush, 461 So.2d at 941–42. Because we did not have the benefit of *Booth* and *Gathers* when we first considered this case, we have decided to reconsider this claim under those decisions.[2]

1. Florida Rule of Criminal Procedure 3.850.

2. Claims of error under *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), are generally not cognizable in a habeas corpus proceeding. *Roberts v. State*, 568 So.2d 1255 (Fla.1990); *Jackson v. Dugger*, 547 So.2d 1197, 1199 n. 2 (Fla.1989). However, in *Jackson* this Court considered the *Booth* claim during habeas proceedings because this Court had specifically approved the introduction of the testimony on direct appeal. Because this case comes to us in a similar procedural posture to *Jackson*, we have chosen to discuss this claim on the merits. *Cf. Parker v. Dugger*, 550 So.2d 459 (Fla.1989) (*Booth* claims procedurally barred because the defendant had not objected to the use of the victim impact evidence at trial). However, we refuse to consider claims of *Booth* error that occurred during jury selection, when the prosecutor was asking prospective jurors if they knew members of the victim's family, because the defendant did not object.

In *Booth* the Supreme Court held that Maryland's requirement that a "victim impact statement" be considered during sentencing violated the eighth amendment. The "victim impact statement" in that case contained extensive information about "the victims' outstanding personal qualities" and "the emotional and personal problems the family members have faced as a result of the crimes." *Booth*, 482 U.S. at 499, 107 S.Ct. at 2531. The victim impact statement also presented information concerning "the family members' opinions and characterizations of the crimes" including the son's statement that "his parents were 'butchered like animals.'" *Id.* at 508, 107 S.Ct. at 2535. The Supreme Court concluded that "the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." *Id.* Thus, such information could result in a jury's imposing the death penalty in an arbitrary and capricious manner. *Id.* at 502–03, 107 S.Ct. at 2532–33.

The Supreme Court again considered *Booth* error in *Gathers*. During the sentencing phase closing arguments in *Gathers* the prosecutor read extensive portions of a printed prayer as well as emphasizing other religious objects and a voter registration card all found in the victim's possession. *Gathers*, 490 U.S. at 808–10, 109 S.Ct. at 2209–10. The Court held that this argument violated *Booth* because it focused the jury's attention on the victim's personal qualities and characteristics, factors about which the defendant was unaware. *Id.*, 490 U.S. at 811, 109 S.Ct. at 2210–11. The information was not relevant to the circumstances of the crime nor to the defendant's moral culpability. *Id.* at 811–12, 109 S.Ct. at 2210–11.

[2] In comparison to the extensive victim impact evidence presented to the juries in *Booth* and *Gathers*, in this case the prosecutor made only one comment about how the family would miss the victim during an upcoming holiday. The single comment in this case cannot compare in impact to that created by the victim impact statement in *Booth* or the use of the prayer in *Gathers*. The comment did not impermissibly emphasize the victim's personal qualities or the family's opinions and characterizations of the crime. The comment was only a single statement about the family's loss, a loss that juries are generally aware that families feel when a family member is murdered. Although the comment was improper, we can say beyond a reasonable doubt that the jury's recommendation would have been no different had it not heard this statement. *See Jackson v. Dugger*, 547 So.2d 1197 (Fla.1989).[3]

Bush's next claim is that this Court should vacate his death sentence and impose a sentence of life imprisonment because the sentencing judge failed to issue a contemporaneous written sentencing order with his oral announcement of sentence.[4] This claim is procedurally barred. *Parker v. Dugger*, 550 So.2d 459 (Fla.1989). We also note that Bush's sentencing preceded our decision in *Grossman v. State*, 525 So.2d 833 (Fla.1988), *cert. denied*, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989), and comported with the sentencing requirements we set out in *Stewart v. State*, 549 So.2d 171 (Fla.1989), *cert. denied*, — U.S. —, 110 S.Ct. 3294, 111 L.Ed.2d 802 (1990).

[3] Bush next argues that the cold, calculated, and premeditated aggravating factor was improperly applied. This claim

3. The United States District Court for the Middle District of Florida has similarly rejected Bush's claims of *Booth* error. *Bush v. Dugger*, Case No. 88-22-CIV-FtM-13 (M.D.Fla. Aug. 8, 1989).

4. Pursuant to the directions of this Court, the judge subsequently incorporated his oral findings into a written sentencing order.

is procedurally barred because Bush raised the claim on direct appeal. Bush's reliance on *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), is misplaced. *Brown v. State*, 565 So.2d 304 (Fla.), *cert. denied*, — U.S. —, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990).

[4] Finally, Bush claims that he is entitled to relief because the penalty phase jury instructions unconstitutionally shifted the burden of proof to him to prove death was not the appropriate penalty. This claim is procedurally barred because Bush did not object to the instructions at trial. We also note that the instructions were not erroneous. *Bertolotti v. Dugger*, 883 F.2d 1503 (11th Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 3296, 111 L.Ed.2d 804 (1990).

We deny the petition for habeas corpus.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, BARKETT, GRIMES, KOGAN and HARDING, JJ., concur.

STATE of Florida, Petitioner,

v.

Michael DONALDSON, Respondent.

No. 76129.

Supreme Court of Florida.

May 9, 1991.

Defendant petitioned for writ of certiorari from determination of the Circuit Court, Palm Beach County, James T. Carlisle, J., which affirmed defendant's driving under the influence conviction in County Court. The District Court of Appeal, 561 So.2d 648, granted writ, and question was certified. The Supreme Court, McDonald, J., held that breathalyzer test results were not admissible where no testimony on reliability or integrity of machine was offered.

Question answered.

1. Automobiles ⇐422

In order for breathalyzer test results to be admissible, there must be probative evidence that test was performed substantially in accordance with methods approved by Department of Health and Rehabilitative Services, and with type of machine approved by Department, by person trained and qualified to conduct it, and that machine itself has been calibrated, tested, and inspected in accordance with Department regulations to assure its accuracy; evidence of reliability of machine can be presented by person conducting its testing and inspection or, if records of use and periodic testing are kept in regular course of business, by production of such records. West's F.S.A. § 316.193.

2. Automobiles ⇐424

Minor deviations in compliance with regulations, such as storage location or absolute timeliness of periodic inspection, will not prohibit breathalyzer test results from being presented, provided that there is evidence from which fact finder can conclude that machine itself remained accurate. West's F.S.A. § 316.1934(3); F.S.1987, § 316.1932(1)(b)1.

3. Automobiles ⇐422, 423

After State presents breathalyzer test results, defendant may, in any proceeding, attack reliability of testing procedures and qualifications of operator; defendant also may question compliance with departmental regulations and effect on machine's integrity of failing to follow them strictly.

4. Automobiles ⇐424

Breathalyzer test results were not admissible where State presented no testimony on reliability or integrity of machine used.

David H. Bludworth, State Atty. and Robert S. Jaegers, Asst. State Atty., West Palm Beach, for petitioner.

Attachment H

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

JOHN EARL BUSH,

Petitioner,

v. Case No. 88-22-CIV-FtM-13

RICHARD L. DUGGER,
Florida Department of
Corrections

Respondent.

ORDER

On the morning of April 27, 1982, four men abducted Francis Slater from a convenience store where she worked. Her body was found later that same day, some thirteen miles away. It evinced a stab wound in the abdomen and a bullet hole in the back of her head. She had been robbed of $134.00. John Earl Bush was tried for the crimes in November of 1982 and was convicted, by jury, of first degree murder, armed robbery and kidnapping. By a vote of 7-5, the jury recommended that Bush receive the death penalty for his role in the murder. Said sentence was imposed. Bush appealed his conviction and sentence to the Florida Supreme Court. See Bush v. State, 461 So.2d 936 (Fla. 1984). The appeal raised ten claims:

(1) Bush claimed an investigator's testimony contradicted an earlier deposition and therefore he, Bush, was entitled to a mistrial or at least a hearing pursuant to Richardson v. State, 246 So.2d 1149, 1151 (Fla. 1979). The trial judge granted neither and Bush claimed the refusal was in error. The Florida Supreme Court rejected this claim since a change of testimony is not a discovery violation meriting a Richardson hearing; the change of testimony did not result in an absolute legal necessity for a mistrial; the discrepancy may have arisen from defense counsel's use of two different questions and testimonial discrepancies are to be resolved by the jury and, when offered by witnesses for the prosecution, inure to the benefit of the defendant.

(2) Bush claimed his four statements to the police were not voluntary but were procured by improper influence and without the benefit of a proper warning pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Specifically, he alleged officers coerced his confession by minimizing his role in the crime. The court rejected this claim since a confession is not rendered inadmissible by the interrogator's assurance that it would be easier on the accused if he told the truth, see Paramore v. State, 229 So.2d 855, 858 (Fla. 1969) and since police statements minimizing Bush's actions were not unconstitutionally coercive. See e.g., La Rocca v. State, 401 So.2d 866, 868 (Fla. 1st DCA 1981).

(3) Bush claimed the trial judge erred by admitting into evidence gruesome photographs of the victim's body which may have prejudiced Bush's effort to get a fair trial. The court rejected this claim since relevant photographs are admissible. See State v. Wright, 265 So.2d 361, 362 (Fla. 1972).

(4) Bush claimed the trial judge erred in excluding a potential juror on a challenge for cause. The court rejected this claim

since a jury venireman may be excluded when he demonstrates an "unmistakably clear" attitude toward the death penalty which would prevent him from making an impartial decision as to the defendant's guilt. See Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). When asked by defense counsel, "Do you think you could do it [impose the death penalty], put sympathy out of your mind and base your verdict on the law and the evidence?," the juror responded, "No, I don't think so."

(5) Bush claimed he was prejudiced by not knowing whether the state would proceed against him on a theory of actual murder or felony murder. The court rejected this claim based on Knight v. State, 338 So.2d 201 (Fla. 1976) wherein it held that an indictment charging premeditated murder would permit the state to proceed on either theory.

(6) Bush claimed the trial judge erred in not giving an instruction for third-degree murder. The court rejected this claim since third-degree murder is defined as "the unlawful killing of a human being, when perpetrated without any design to affect death, by a person engaged in the perpetration of, or in the attempt to perpetrate any felony other than,...robbery...[or]...kidnapping-...." Section 782.04(4), Florida Statutes (1981) (emphasis added).

(7) Bush claimed the Florida capital sentencing statute is unconstitutional. The court rejected this claim based on Proffitt v. Florida, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913 (1976).

(8) Bush claimed he was prejudiced by repeated instructions to the jury to the effect that a sentencing decision requires a majority. The court rejected this claim since the trial judge expressly corrected himself by explaining: "if by six or more votes the jury determines that [Bush] should not be sentenced to death, your advisory sentence will be [imposition of a life sentence]." Bush v. State, 461 So.2d at 941.

(9) Bush claimed the trial judge erred in not instructing the jury during the sentencing phase that death may not be imposed absent an intent to kill or contemplation that life would be taken. The court rejected this claim since the facts showed Bush to be a "major, active participant...[whose] direct actions contributed to the death of the victim" and were enough to establish the requisite intent. Id. at 941.[1]

(10) Bush claimed he was prejudiced by prosecutorial appeal to sympathy for the victim's family. The court denied this claim since the statements made were not clearly abusive, nor did they arise to a denial of fundamental fairness.

Accordingly, the Florida Supreme Court affirmed Bush's conviction and sentence on November 29, 1984--some two years after their imposition. Bush moved for rehearing. Rehearing was denied January 31, 1985. Bush v. State, 461 So.2d 936 (Fla. 1985). Bush filed a Petition for Writ of Certiorari with the United States

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[1]The Court notes that the finding of "intent" necessary to sustain imposition of the death penalty can be made by the trial judge or an appellate court as well as by a jury. See Cabana v. Bullock, 106 S.Ct. 689 (1986).

Supreme Court; it too was denied. Bush v. Florida, 106 S.Ct. 1237 (1986). Florida's Governor signed Bush's first death warrant on March 20, 1986. Execution was scheduled for April 22 of the same year. On April 21, Bush moved for a Stay of Execution and filed a Motion to Vacate his Judgment and Sentence pursuant to Fla. R. Crim. P. 3.850. Both motions were denied by Chief Judge C. Pfeiffer Trowbridge, Nineteenth Judicial Circuit in and for Martin County, Florida. Mr. Bush filed an immediate Petition for Writ of Habeas Corpus in the Florida Supreme Court appealing the denial of his Motion to Vacate Judgment and Sentence. The Florida Supreme Court granted a stay of execution to consider Bush's claims. He raised seven:

(1) Bush claimed he received ineffective assistance from his appointed counsel in violation of the standards which the Supreme Court enunciated in Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Upon consideration, the court rejected this claim since none of the alleged omissions fell outside the wide range of assistance deemed professionally competent.

(2) Bush claimed he was prejudiced by a professionally inadequate psychiatric evaluation which failed to disclose his alleged incompetency to stand trial. The court rejected this claim finding no evidence that Bush was incompetent to stand trial.

(3) Bush claimed he was incompetent to stand trial. The court rejected this claim finding no evidence to support it.

(4-7) The court rejected without enumerating the remaining

four claims since they could have been raised on direct appeal and were therefore procedurally barred from collateral attack.[2]

Accordingly, the Florida Supreme Court denied the petition on February 26, 1987. Bush filed for rehearing and rehearing was denied, May 8, 1987. Bush filed another Petition for Certiorari with the United States Supreme Court; it too was denied, October 5, 1987. Bush v. Florida, 108 S.Ct. 209 (1987).

On January 8, 1988, Florida Governor Bob Martinez signed the petitioner's second death warrant. The execution was scheduled for February 3, 1988. On February 1, Bush filed the instant action: a 17 claim, 245 page federal habeas corpus petition claiming that his constitutional rights had been violated before trial, during trial, at sentencing and on appeal. Specifically, the petition reasserted the arguments asserted before the state courts and argued, inter alia, that Mr. Bush was a "victim," that the lawyers with which he was provided were ineffective, that his prosecutors set him up, his police interrogatories coerced his confession, his jury was confused about its role and his judge allowed illegal evidence to be admitted against him. This Court stayed the execution to allow itself time to consider Mr. Bush's claims. Ultimately, the Court granted Bush a hearing to consider his claim that he was deprived

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[2]Those claims were (a) that the state misled the jury by the presentation of false evidence and argument; (b) that the prosecutor's closing argument at the penalty phase was inflammatory and highly prejudicial; (c) that the penalty phase jury instructions diluted the jury's sense of responsibility; and (d) that Florida imposes the death penalty in an unconstitutional, racially-biased manner. See Initial Brief of the Appellant, State Court Collateral Proceedings, at i - iii.

of effective assistance of counsel at the sentencing phase of his trial. The Court now renders its decision as to each of the allegations:

While the petitioner has raised a plethora of issues before this Court, his petition is based primarily on his claim that he was deprived of effective assistance of counsel at all stages of his prosecution and sentencing. It is therefore necessary to set out the events which led up to his sentencing (paying particular attention to the assistance provided by trial counsel) and to set out a standard against which the Court is to determine whether the assistance rendered was constitutionally defective. The two will be done in reverse order.

A. Ineffective Assistance of Counsel

To prove that his legal representation was so defective as to require a reversal of his conviction or his sentence of death, petitioner must do two things: he must prove that his lawyer's performance was deficient--that is, that performance fell below an objective standard of reasonableness--and he must show that the deficient performance prejudiced the outcome or the defense. Strickland v. Washington, 466 U.S. 668, 687-88 (1983). Counsel's standard is that of "reasonably effective assistance within the wide range of competence demanded of attorneys in criminal cases." Id at 687 and 690. See also Thomas v. Wainwright, 787 F.2d 1447, 1449 (11th Cir. 1986).

Judicial scrutiny of a counsel's performance must be highly deferential. The court's every effort should be made to eliminate

the distorting effects of hindsight, to reconstruct the circumstances of the challenged conduct, and to evaluate that conduct from counsel's perspective at the time. Strickland, 466 U.S. at 689. The court must indulge a strong presumption that counsel's conduct "falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. See also, Darden v. Wainwright, 91 L.Ed. 2d 144, 160 (1986).

These standards require no special amplification in order to define counsel's duty to investigate. Strickland, supra at 690. A criminal attorney has the duty to investigate, but the scope of investigation is governed by a reasonableness standard. Mitchell v. Kemp, 762 F.2d 886, 888 (11th Cir. 1985) cert. denied 107 S.Ct. 3248, 97 L.Ed. 2d 774 (1987). The duty is to make reasonable investigations or to make reasonable decisions which render particular investigations unnecessary. Id. See also Strickland, supra at 691. The reasonableness of a counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Id. at 691. While counsel may not refuse to search the defendant's background before sentencing, see e.g., Thomas, supra, counsel has no absolute duty to present mitigating character evidence at the sentencing hearing and the decision not to do so may be a sound strategic one. Stanley v. Zant, 697 F.2d

955, 961-62 (11th Cir. 1983) cited for support in Mitchell, supra at 890 (11th Cir. 1985).[3]

However, even if petitioner's counsel made a professionally unreasonable error, neither the conviction nor the sentence will be overturned if the error had no effect on the judgment. Strickland, supra at 691-92. The claim that an attorney's performance was deficient is subject to the general requirement that the defendant affirmatively prove prejudice. Id. at 693. A defendant need not show that his counsel's deficiencies "more likely than not" altered the outcome in the case. Id. But it is not enough for him to show that the errors had some conceivable effect on the

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[3]In Mitchell, the 11th Circuit held an attorney was not in error for failing to present mitigating background evidence at the capital sentencing hearing where (1) the attorney spoke with the defendant about his background, (2) the defendant discouraged the attorney from looking into his background, (3) the attorney contacted the defendant's father and found him unwilling to offer any assistance, and (4) the attorney believed the possibility of finding anything in the defendant's background that would help the defense was nil. Mitchell, supra at 889. The Mitchell court found it significant, however, that the attorney did not just blindly follow the defendant's direction, but made an independent evaluation of the usefulness of character witnesses by an in-depth conversation with the defendant. Id. at 890.

Likewise, in Burger v. Kemp, 97 L.Ed. 2d 638 (1987) the U.S. Supreme Court held that an attorney's failure to investigate the accused's background more thoroughly and to present in mitigation the facts of the accused's unhappy and unstable childhood, did not constitute a denial of the accused's Sixth Amendment right to effective assistance of counsel where the attorney's actions were supported by reasonable professional judgment. That judgment was supported by the counsel's decision that evidence of his client's background would not have minimized the risk of his receiving the death penalty and, in all likelihood, would have opened doors for the prosecution that, from the defendant's perspective, were best left unopened. Id. at 653-58 (evidence of the background would have undermined the defense theory that the defendant was under the dominion of another defendant on the night of the murder). Id. at 656-57.

outcome of the proceeding. Id. He must show that there is a reasonable probability that, but for the unprofessional errors, the result of the proceeding would have been different. Reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694.

If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, supra at 697.

B. Facts Relevant to the Defense

In October of 1974, John Earl Bush was sentenced to 30 years in prison for the rape, robbery and kidnapping of a nineteen year old woman. In his trial for those offenses, Bush was represented by an attorney named "Schopp" who was originally appointed to represent him in his trial for the murder, robbery and kidnapping of Miss Slater. Mr. Bush objected to Schopp's representation in the Slater case, and attorney Lee Muschott volunteered for the job upon Judge Trowbridge's request that he do so. (H. at 350-51).[4] At that time, Muschott had been an attorney for eight years (H. at 292) and had experience with capital cases (H. at 350). From the start, he analyzed Bush's case as one in which the prosecutor's would seek a penalty of death. (H. at 352).

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[4]Throughout this opinion, "H. at __" is a reference to the page number of the transcript of the Evidentiary Hearing held by this Court on January 4-6, 1989. "Petition" refers to Mr. Bush's Petition for Federal Habeas Corpus relief. "SR" refers to the state's initial Response to the Petition. "R" refers to the trial record. Other references are made more explicitly in the text.

Mr. Muschott met with Schopp and learned of the circumstances surrounding Bush's prior conviction for rape. (H. at 298). Muschott characterized them as "horrendous." He also reviewed the court file (H. at 296-98) and learned that the rape victim was left traumatized and in need of psychiatric care for several years after the incident. (H. at 365). The similarity between crimes was striking: both involved the kidnapping, robbery and assault of young, white females with the assistance of accomplices. (H. at 364-66). And in both instances, there was evidence to implicate the leadership of one John Earl Bush. (Id.) Those "horrendous" circumstances were also known to prosecutors Stone and Midelas; and Muschott believed that if the facts relating to the earlier kidnapping, robbery and rape, were made known, during the sentencing phase, to a jury that had just convicted Bush of kidnapping, robbery and murder, Bush's chances of avoiding the death penalty would be nil. (H. at 364-66). A key element of Muschott's strategy was to prevent Stone and Midelas from getting before the jury any of the specific details of Bush's prior offenses. (H. at 364-65).

In addition to meeting with Schopp, Muschott met with W.C. Bush, the petitioner's brother, and spoke with him several times prior to trial regarding the petitioner's background. (H. at 299-300). Muschott told W.C. Bush that other family members could contact him (Muschott) if they wished. (H. at 299-300). Muschott also met with W.C. Bush, Sr., petitioner's father (H. at 302), with Georganna Williams, petitioner's girlfriend (H. at 312), and with

Moses Mitchell, petitioner's brother-in-law (H. at 310) to discuss various aspects of the case and of Bush's background. Mr. Muschott specifically discussed the possibility of mitigating circumstances with Bush's brother and his father and asked them both if they had anything to offer. (H. at 366). They did not and, according to Muschott, indicated that they did not wish to testify on Bush's behalf (i.e., at the sentencing phase). (H. at 367). Bush himself told Muschott that he did not want his father to testify. (H. at 367). Throughout the course of these various meetings, and during the more than 20 meetings Muschott had with Bush himself, Muschott become familiar with Bush's familial and educational history (H. at 300) and learned of Bush's problems in prison, including his repeated rapes and his subjection to physical abuse. (H. at 343-44, 396).

At a status conference, Muschott requested and received the appointment of a Dr. Tingle to help him evaluate the possibility of developing defenses or mitigating factors based on Mr. Bush's psychiatric profile. Muschott requested Dr. Tingle because of his defense-oriented reputation. (H. at 322, 377-78). In Muschott's words, Tingle was more "liberal, if you will, in terms of the defense position...." (H. at 378). The court also appointed an experienced investigator (Hershel Thompson) with whom Muschott had had a prior, satisfactory working relationship. (H. at 352). Thompson met with Bush on a number of occasions and reported back to Muschott with whatever information he had obtained. (H. at 354).

Prior to Muschott's appointment as Bush's counsel, Bush gave four statements to the police, the fourth of which was against the advice of then appointed attorney Schopp. (R. at 811-12).[5] In the first, Bush denied any involvement in the Slater abduction, but he said that, on the night of the murder, he had given a ride to three men whom he did not know. (R. 690-91; SR at 15). He also claimed he had an alibi. (R. at 707-08, 728-29). When officers took Bush to West Palm Beach to verify this alibi, Bush withdrew the defense and volunteered a second statement in which he admitted that he, Pig Parker, Alphonso Cave and Terry Johnson had gone to Ft. Pierce with the intention of committing robbery and that the four had abducted, robbed and murdered Miss Slater. (R. 749-55; SR at 16). Bush denied that he had stabbed or shot the victim; he denied that he knew who's idea it was to kill her, and he denied that he had seen anyone with a knife. Id.

Bush gave his third statement later that same evening after he and the officers had returned from West Palm Beach. Therein he admitted driving the get-away vehicle, owning the murder weapon and disposing of it the next day of his own accord. (R. at 761-81; SR at 17-18). He also admitted that he had received part of the robbery proceeds. Id. Although Bush stated that he had been drinking on the night of the murder, he indicated that he had not been drinking as much as the others and that he knew what he was doing at all times. Id. Bush was subsequently arrested and jailed. On or about May 7, he sent a note from jail indicating that he wanted

[5]The statements were given between May 4th and 7th, 1982.

to see a sheriff in order to "get it straight." (R. at 797; SR at 18). Sheriff Holt advised Bush that he had to contact his attorney before he could make any statement. Bush responded, "[n]otify him, I want to tell my side." Id. Attorney Schopp advised Bush not to make any further statements but Bush insisted. (R. at 798-801; SR at 18-19). In his fourth statement, Bush admitted that he was the one who stabbed Francis Slater but said that he had "faked" it in an effort to get his cohorts to leave her alone. (R. at 820-22; SR at 19). Although Muschott objected to the admission of each of the four statements at trial on the grounds that they were not freely and voluntarily given, each objection was denied. (R. at 626, 640, 649 and 667). Faced with Bush's prior admissions, and with Muschott's own conclusions (discussed below) that Bush was competent and that he had assumed a leadership role in the Slater murder as well as in the 1974 rape of the nineteen year old, Muschott decided that his best defense (and his best chance of avoiding the death penalty for his client) was to argue that Mr. Bush never had any intention of killing Francis Slater, that he wanted no part in her death and that, in fact, he had schemed against his codefendants to spare her life. (See e.g., R. at 964, 969, 1002-03). This plan dove-tailed with Mr. Bush's fourth statement wherein he confessed that he had stabbed Slater but stated that he did so only with the intention of feigning her death so that the other abductors would leave her alone. It was also substantiated by Bush's claim that he refused Pig Parker's attempt to force the gun on him in demand that he kill the victim. Muschott urged such aspects of Bush's confes-

sions upon the jury along with the testimony of the examining physician to the effect that Slater's stab wound was only two inches deep and was not fatal, and along with certain other mitigating factors such as Mr. Bush's voluntary confessions and his role in breaking the case for investigating officers. Since Bush struck Muschott as being "very cold" and unremorseful, and since Muschott feared that prosecutors would be able to trick a testifying Bush into opening doors to his disadvantage, Muschott urged Bush not to take the stand at trial. (H. at 355, 370). Bush complied and the jury found him guilty on all counts.

During the sentencing phase, Mr. Muschott chose to present no evidence in mitigation although he could have presented what he had regarding Bush's family background, prison experience, and possible intoxication or mental disability. He made his decision for three reasons: (1) there was no mental disability to exploit and any attempt to create one would only have damaged his credibility with the jury; (2) Bush had confessed that he knew what he was doing on the night of the murder and any post-trial attempt to show intoxication would, likewise, have damaged his credibility; and (3) any evidence offered in an attempt to paint Bush as a docile, sympathetic and "sheeplike" follower would have been false, as well as unsuccessful, and would have invited the prosecutors to offer details of the prior rape, robbery and kidnapping in rebuttal. Muschott thought the state was saving its "heavy artillery" for just such an opportunity. (H. at 371). His strategy was to leave the state hanging with its "bare bones" aggravating circumstances

argument by never opening the all too obvious doors through which the state planned to usher in unwelcomed facts. (H. at 371). At the same time, Mr. Muschott would ask the jurors to take into the jury room a recording of Bush's third statement to the police. According to Muschott, only in the third statement did Bush present himself as a sympathetic, remorseful person. (H. at 370, 403). That way, Mr. Bush could address the jury in his most sympathetic posture, without the fear of damaging cross-examination and without the risk of opening any doors. In Muschott's words, "the beauty of the tape in the jury room was that we didn't open any doors. That was a device that was utilized in closing argument. The tape was already in evidence. And we didn't have to risk anything by using [it]." (H. at 371). Muschott developed this strategy early in the case (H. at 422) and had discussed with Bush, Bush's father and Bush's brother, the pros and cons of taking the stand. (H. at 361-62, 370, 422).

After the state had presented its "bare boned" argument for the death penalty, the trial court recessed for lunch. Just as it reconvened, Bush leaned over to Muschott and told him he had changed his mind and was going to testify. (H. at 372). Muschott reasserted his recommendation that Bush not testify, but Bush insisted, and Muschott felt obligated to put him on the stand. (H. at 372-73). Muschott conducted a brief direct allowing Bush to tell his version of the events surrounding the crime. Then he had no choice but to turn his client over for cross-examination. In Muschott's words, it was "devastating." (H. at 375). Bush

appeared "totally without remorse, ruthless, [and] cold;" and he stared at the jury "menacingly" during the entire time he was on the stand. (H. at 374). Although the jury requested and received a copy of the third statement, they returned with a 7-5 recommendation that Bush receive the death penalty for the murder of Francis Slater.

In hindsight, Bush faults Muschott for not pursuing defenses based on his incompetence and on his "sheeplike" disposition. In short, Bush's appellate lawyers claim their client did not know what he was doing during the crime, was not able to assist in his defense, and only acted as he did because he was coerced into doing so by defendants Parker, Cave and Johnston. All in all, they raise 17 claims.

CLAIM I

THE PETITIONER WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Specifically, Bush alleges six (6) errors which rendered his counsel's performance constitutionally defective. The Court will address each in the order in which it was raised.

(a) The petitioner claims that he was and is mentally incompetent but that his counsel made no effort whatsoever to investigate, develop and present evidence of incompetency to the jury. Petition, at 8.

There is adequate evidence to indicate that the petitioner's trial counsel made an effort to determine whether he might be incompetent to stand trial but concluded, upon consultation with a

psychiatrist and Mr. Bush, that incompetency was a "dead end." (H. at 322-33, 342, 377-78, esp. 326 and 335). Bush displayed signs of intelligence throughout the commission of his crimes, during his interrogations and during trial. He owned the get-away vehicle and the murder weapon. He drove the four men away from the scene of the crime. Within an hour of its commission, they were pulled over in a remote portion of western St. Lucie County by deputy Tim Vargo. Having no way of knowing the reason for their stop, the men discussed whether to shoot deputy Vargo but opted against it upon Bush's suggestion that they "just wait and see what happens."[6] As it turned out, Vargo had pulled the men over because Bush's car had a defective tail light. Vargo stated that Bush was "calm, cool and collected."[7] He produced his driver's license and registration, acted normally and did nothing to arouse suspicion. Mr. Bush maintained his composure even when deputy Vargo pulled him over a second time after a computer check revealed a problem with the car's registration.. (H. at 381-83).

Between the time of the murder and the trial, Mr. Bush did numerous things which evinced his competence and his ability to appreciate the criminality of his conduct. His co-defendants made statements to the effect that Bush had analogized the crime with his prior commission of rape (for which he was sent to prison) and encouraged disposing of Miss Slater to prevent a recurrence of his

[6]The quote is attributed to Muschott's recollection. H. at 383. His performance must, of course, be assessed against his understanding of the facts at the time.

[7]Id.

prison experience. (H. at 349-50, 379). Bush attempted to hide the murder weapon at his brother's house but, after the crime began to receive publicity, he returned to his brother's house, retrieved the gun and cast it into Taylor Creek. (R. at 828-30). The weapon was never recovered. Bush made significant efforts to recover his vehicle, which the police had seized, and even directed his counsel to act on his behalf in retrieving same. (H. at 358).[8]

As indicated, the same counsel who represented Bush in his trial for rape was initially appointed to represent him in the instant trial for kidnapping, robbery and murder. Despite that counsel's advice that Bush not give any more statements than he had already given, Bush initiated contact with Sheriff Holt and volunteered his confession.[9] (R. at 810-49, H. at 381-82). As in the other three statements, Bush gave the impression that he knew what he was doing at all relevant times. (H at 386). He even told officers that during commission of the crime he was scheming against his companions to find a way to spare the victim's life. (R. at 822-23, 840). Attorney Muschott testified that Bush had no problems communicating; that he had initially asserted an alibi

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[8]Muschott testified that Bush "was very adamant about certain things he wanted looked into with respect to his car. Mr. Bush was never hesitant to communicate with me about the case or about any other matters that he felt needed attention from me or anybody else." (H. at 358).

[9]Bush gave four statements to the police. In the first he denied everything. In the second he admitted to being present during the crimes. In the third he admitted his participation but denied that he stabbed or shot the victim. In his fourth he admitted that he stabbed the victim but denied that he shot her. (R. beginning at 626, 640, 649 and 667).

(but subsequently withdrew it); that he refused to enter the courtroom without his shoes; that he gave no indication that he was ever out of touch with reality during the crime; that he understood the incriminating nature of his conduct during the crime; and that he appeared to have average intelligence. (H. at 355, 390-91).

Even so, Muschott met with Dr. Tingle on August 12 of 1982 and spent between thirty minutes and an hour discussing the facts of the case against Bush, the facts Muschott knew relevant to Mr. Bush's background, education and family life, the facts relating to the rape, Bush's prison experience, Muschott's impressions of Bush and all matters known which were relevant to the prospects of developing a psychologically based defense during the guilt/innocence or sentencing phase of the trial. (H. at 322-35). The two discussed all records of which Muschott was aware (such as police reports, co-defendant statements, etc.) they considered personality testing, and they discussed Bush's mental status from the time of the offense up until the time of their conversation. (H. at 334-35). Ultimately, Dr. Tingle concluded that there was nothing that he could do to help Bush's defense. (H. at 376-78). The position in which Muschott found himself is well represented in the following exchange between he and petitioner's appellate counsel before this Court:

> Q. Now, at the time of Mr. Bush's sentencing in 1982, is it fair to say that you had not developed at that point or did not have at that point any mental health mitigating evidence, any expert testimony along those lines?
>
> A. Had not developed anything, that's correct.

> Q. So, at the time, you didn't do a weighing process, should I put this on, should I not put this on, in that regard?
>
> A. Well, I had done that weighing process prior to the sentencing phase of the trial.
>
> Q. Right. But I guess my point is, you couldn't weigh something you didn't have?
>
> A. Well, I couldn't have something I couldn't develop. ...[A]t that point [I] had not...been able to develop anything that [would have] outweighed what would have come in on the coattails of that from the state (emphasis added).

(H. at 342).

Bush's demonstrated ability to make his own decisions (about how to cover up his crimes, who to talk to and when, which lawyer to have appointed, etc.) belies his claim that he was incompetent to stand trial while, at the same time, it compelled his lawyer's strategic decision not to risk credibility by attempting to paint Bush as a passive participant who was simply led astray by a "bad crowd." In light of the information known to attorney Muschott at the time, it was not constitutionally ineffective for him to forgo the incompetency route. Even now, seven years after the fact, Bush has failed to raise a substantial doubt about his competence. See Claim III, below. During the time at which Muschott had to make decisions regarding trial strategy, the suggestion of incompetence was even more farfetched. Upon its independent consideration, this Court agrees with the Florida Supreme Court that there was no evidence then available and known to Muschott, suggesting that Bush was incompetent to stand trial. See Bush, 505 So.2d 409, 410-11 (Fla. 1987). In the absence of evidence indicating that Bush was

incompetent, and in the presence of so much evidence attesting to his competence, his defense was not rendered ineffective by counsel's decision not to pursue incompetency further than he did. See Burger v. Kemp, 483 U.S. ___, 107 S.Ct. ___, 97 L.Ed.2d 638 (1987); Lindsey v. Smith, 820 F.2d 1137, 1144 (11th Cir. 1987); Solomon v. Kemp, 735 F.2d 395, 402 (11th Cir. 1984).

Petitioner's assertions to the contrary notwithstanding, Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) does not entitle him to a competency evaluation even when his counsel concludes, after consulting with a psychologist, that such an evaluation would be futile. His counsel's failure to secure one in this case was not ineffective within the parameters established by Strickland. See also Bowden v. Kemp, 767 F.2d 761 (11th Cir. 1985); Martin v. Wainwright, 770 F.2d 918, 934-35 (11th Cir. 1985). Foster v. Dugger, 823 F.2d 402 (11th Cir. 1987) (counsel not ineffective for failing to conduct detailed investigation into petitioner's mental history given strategic decision that insanity defense unlikely to be successful). See also Claim IV, below.

(b) The petitioner claims that he was intoxicated at the time of the murder, that his intoxication negated any specific intent to commit the crime and that his attorney's failure to request an instruction on voluntary intoxication was the result of ignorance and not trial strategy. Petition, at 9-17, citing Gardner v. State, 480 So.2d 91, 92-93 (Fla. 1985).

Mr. Muschott knew that the defendants claimed to have been drinking and smoking marijuana on the night of the murder. (H. at

345). He decided not to push the intoxication defense, however, since he felt it would have undermined his credibility with the jury. (H. at 388). If Mr. Muschott had argued that Bush was so intoxicated that he was unable to formulate a specific intent to commit the crimes, he would have had to explain (a) why Bush did not appear intoxicated to deputy Vargo who pulled Bush over twice within an hour of the murder in the wee hours of the morning at a time when officers are most suspecting of drunk drivers;[10] (b) why Bush had admitted prior to trial that he knew what he was doing, that he did not drink as much as the others and that he was not so drunk as to be unaware of what was happening, (R. at 768, 769, 774, 785, 1188-1190); and (c) how it was that his intoxication prevented him from formulating the specific intent to commit the crimes but did not prevent him from scheming to foil his co-defendants' murderous intentions. The decision to pursue one of two mutually exclusive defenses does not amount to unconstitutionally ineffective representation.

(c) The petitioner claims that his attorney failed to offer "exculpatory" evidence to prove that Bush was not the triggerman;

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[10]Muschott testified:

> I know from experience in law enforcement, particularly road officers, that in any late night stop situation, one of the first things they're going to look for is to determine whether the driver is under the influence and that would be appropriate to make a DUI arrest or at least to give roadsides. And it's been my experience that they give roadsides if there's any indication of alcohol on the breath or impairment of faculties.

(H. at 387-88).

thus the government was able to produce a picture of the victim's lifeless body and argue, in closing, "[t]his is what happens when John Earl Bush fires a .38 caliber bullet into her head." Petition, at 17-24.

Muschott testified that the state never took the position, by argument or presentation of evidence, that Bush fired the gun. (H. at 315). He argued there was no reason to present evidence to disprove something the state had no intention or means of proving. Id.[11] The primary evidence available to Muschott would have been (a) Bush's testimony to the effect that he was not the shooter, and (b) Pig Parker's statement to Georganna Williams to the effect that he, Parker, had fired the gun. (H. at 313). Mr. Muschott could not have contemplated offering the first since he had planned to keep Bush off of the stand right up until the very end when Bush insisted on taking it (at the sentencing phase).[12] Muschott feared eliciting the second since it might have opened doors through which the state might have offered details about Bush's prior conviction for rape, i.e, the victim's psychological devastation.[13] (H. at 314).

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[11]In his closing statement, prior to the state's remarks, Muschott said, "There's no question from the evidence that this girl was shot by Pig Parker and I don't believe there is any question form the evidence that the weapons were wielded by Parker, and wielded by Cave." (R. at 970).

[12]Even so, this evidence was elicited by the submission of Bush's statements to the police. He consistently denied that he pulled the trigger and the state had nothing to refute the denial.

[13]Pig Parker's confession to Ms. Williams was given along with the explanation that, because of Bush's prior conviction, the state would hang everything on him, in spite of who pulled the trigger.

Even so, at no time prior to closing was Muschott given any indication that the state would seek to argue something he knew it had no hopes of proving. The prosecutor's inexplicable[14] closing remark was given within a context designed to outline the state's case against Bush for felony murder based on his participation in the robbery and kidnapping. (R. at 989-1003). None of the evidence showed Bush to be the shooter. Therefore, Muschott was able to diminish the prosecutor's closing argument by a response which reasserted Bush's claim that he was scheming to buy time between the abduction and the murder, but that time ran out when

> Pig Parker [shot] this girl in the back of the head, not in response to anything Mr. Bush did, but in response to Pig Parker's robbery, in response to Pig Parker's and Cave's abduction of the girl and in response to Pig Parker's knowing that the girl could identify him.

(R. at 1003) (emphasis added). The state offered nothing to show that Bush was the triggerman; and its error during closing may have undermined its credibility with the jury. Before sentencing Bush, the trial judge stated:

> Of course, the only version of the actions that took place that night that we have come[s] from your statements both out of court and in court. I guess we don't have to believe your statement, but since there is no other evidence we can't act upon anything that wasn't in evidence. So we must assume that you were an accomplice in the offense and we must assume, that from the evidence of Dr. Wright, that the actual death occurred as a result of the bullet wound and the only evidence, direct evidence that we have is that another person imposed that. (emphasis supplied).

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[14] But see the Court's discussion of this statement in Claim VI below, especially at page 51-52.

(R. 1304-05). Muschott's decision not to present evidence to prove that Bush was not the triggerman was clearly within the wide parameters of attorney discretion afforded in Strickland. No evidence was offered to prove otherwise and he, Muschott, had no reason to believe the state would suggest that Bush had pulled the trigger. The suggestion came only in closing at which time Muschott had the opportunity to exploit the contradiction. (H. at 369). See also Claim VI, below. He did so.

(d) The petitioner claims that his attorney failed to file pre-trial motions contesting the admissibility of petitioner's various confessions, of identifications obtained at a pre-trial line-up, and of hypnotically-refreshed testimony. Petition, at 24-36.

These omissions are non-prejudicial. The hypnotically-refreshed testimony to which the petitioner refers is that of one "Danielle Symons." She testified at trial that she had seen Mr. Bush in the convenience store on the night of the murder in the company of three other black men. (R. 348). This evidence, like that obtained at the pre-trial line-up, is so cumulative that it could not be prejudicial. There is no contesting Bush's role in the crimes: it was established by his own testimony. He does not deny his presence in the store that night, nor his participation in the crime: nor has he denied either since the first statement to the police.

Mr. Muschott did object to the use of Bush's statements on the ground that they were not given voluntarily. (R. at 627, 640, 649,

650). Appellate counsel faults Muschott for objecting during trial instead of before. This does not a Strickland violation make. See Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985). Even so, the alleged error was not prejudicial. The trial judge found the statements to have been voluntarily given, his decision was affirmed on direct appeal, Bush, 461 So.2d at 939; the record itself reveals the voluntariness of the statements, (see SR at 104-05 and the cites therein), and upon independent consideration of that record in light of the petitioner's instant claims, this Court has reached its own conclusion that the confessions were indeed voluntarily made. See Claim X, below. Mr. Muschott could not possibly have altered this result by objecting earlier than he did.

(e) The petitioner claims that his attorney failed to offer any defense whatsoever. Specifically, the petitioner faults his counsel for not arguing voluntary intoxication, coercion and lack of intent. Petition, at 36-39.

Muschott's decision not to pursue the voluntary intoxication defense beyond the extent that he did is addressed in ground (b), above. His alleged failure to argue lack of intent is belied by the facts: Muschott centered Bush's defense around the argument that Bush never intended to kill Slater, that he did not inflict the fatal wound and that the wound he did cause was inflicted in an effort to prevent the others from committing the murder. In response to the claim that Muschott should have argued that Bush was a passive, "sheeplike" character who only did what he did at the direction of others, Muschott stated that had he argued coer-

cion (i) he would have lost credibility with the judge and jury because the facts showed Bush was at least a co-leader with Pig Parker; (ii) the state would have sought to introduce evidence about Bush's background which showed him to be aggressive, not passive; and (iii) he, Muschott, would have been making an argument which he could not in good conscience make.

Many of the facts reviewed above reveal Bush to be an assertive individual. In addition, Bush himself stated that he was urged by the others (Parker, Cave and Johnson) to outrun deputy Vargo when the latter pulled the four over on the night of the murder. (R. at 825). Bush said he refused their request even though he believed he could have outrun the deputy if he had so desired, and that he pulled over because he wanted to confess the crime then and there. Id. Muschott was also concerned that the state would seek to introduce statements from the other three abductors to the effect that "Bush had said during the course of the abduction and prior to the murder that, 'we need to get rid of the victim,' because he--it was either he or his brother, had gone to prison once before because they didn't get rid of the victim, and that wasn't going to happen again." (R. at 348, 357, 379-80).

The state took the position that Bush had been a leader in the prior rape. Evidence of that leadership, as well as the fact that its victim had fingered Bush from the witness stand, could have been used to buttress the state's argument in favor of the death penalty for the Slater murder. Muschott feared that such evidence might be admitted to counteract any claim that Bush was

subject to coercion. (H. at 348, 379-80 and R. at 346, 357). The Court also notes that any attempt to paint Bush as the defenseless subject of manipulation and coercion might have undermined the attempt to prove that he was scheming to foil his cohorts murderous inclinations.

Finally, Muschott stated that he did not pursue the coercion argument because it would have been a lie. When asked about his view of Bush's role in these three crimes, Muschott said, "I felt that the facts demonstrated or indicated to me or left me with the impression that Mr. Bush was the leader of the group, or certainly the best case scenario from his standpoint, at least the co-leader with Parker. But I felt really that he was the lead person." (H. at 357). Muschott testified that Bush was not at all passive or submissive, but "was very...aggressive." (H. at 358); "adamant about certain things," (H. at 358). The Court notes Bush's rejection of attorney Schopp's advice that he not volunteer a fourth confession and his insistence on testifying during the sentencing phase despite attorney Muschott's advice that he not. Mr. Muschott felt that Bush wanted to be in the spotlight. (H. at 373). Strickland does not compel an attorney to urge an argument which he reasonably finds to be futile, let alone one he finds to be false.

(f) The petitioner claims that his attorney failed to consult with independent experts in effort to contradict the testimony of the Medical Examiner and a Criminologist who testified at trial. Petition, at 39-46.

Two forensic science experts testified at Bush's trial and at the trial of his co-defendants: Dr. Ronald Wright, the medical examiner who performed the victim's autopsy and Daniel C. Nippes, the criminologist who used hair and fiber analysis to "place" the victim in Bush's vehicle on the night of the murder. Dr. Wright testified that the superficiality of the victim's stab wound was consistent with evasive action. (R. at 466-7). Nippes testified that hair he found in Bush's car had been forcibly removed from Miss Slater's head (R. 920); he also testified that her bladder release was consistent with fear prior to death. (R. at 471). Bush faults Muschott for not cross-examining Wright and Nippes on those aspects of their testimonies. Specifically, Bush suggests that effective cross-examination could have established that (i) the superficiality of the wound was consistent with Bush's story that he did not intend to murder the victim; (ii) there are other ways that hair can be forcibly removed, i.e., vigorous brushing; and (iii) there were other possible causes for the victim's bladder release than fear, i.e. her death. Petition, at 39-43. The Court finds these alleged failures non-prejudicial.

First, attorneys for defendants Parker and Johnson tried to establish (ii) and (iii) through cross-examination at their respective trials. Both were convicted.[15] Second, the Court can only

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[15]Parker received the death penalty; Johnston, who played a less significant role than the others, received a life sentence. Even so, it is their convictions, not their sentences, with which the Court is now concerned. In Claim I, Bush is challenging his counsel's effectiveness during the guilt/innocence phase of the trial, not during the sentencing phase.

imagine the ridicule with which prosecutors might have riddled Mr. Muschott's efforts to suggest that Slater's hair had been ripped from her head by "vigorous brushing." Even had they not so argued, the Court cannot imagine any scenario in which Bush's conviction would have been thwarted by even conclusive proof that his victim had forcibly removed her own hair at an earlier time and transferred it into Bush's car only by accident, or proof that Francis Slater wet her pants on the night of her murder, not because she was in any fear, but simply because she died.[16]

Finally, while appellate counsel has succeeded in locating a medical examiner in the state of Georgia who will affirm several years after the fact that Slater's stab wound would not be inconsistent with the story that Bush had not intended serious injury, that hardly proves that Muschott's failure to do the same seven years ago, or even to cross-examine Wright on the point, amounts to constitutionally defective and prejudicial representation. Mr. Muschott cross-examined Dr. Wright regarding the stab wound and elicited the admissions that (a) it was not fatal and (b) it was so shallow and superficial that Wright had difficulty measuring its depth. (R. at 471-73; SR at 109-110). Moreover, Muschott argued that the superficiality of the wound was consistent with Bush's claim that he intended no serious injury. (R. at 824, 969, 1181;

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[16]In Parker's trial Nippes was asked on cross-examination if Slater's complete bladder release was not "equally consistent" with the conclusion that it was caused by death and not fear. Nippes responded, "[n]o, it's not equal because it's highly unusual to have the bladder completely emptied, and also the staining around the pants. But that does occur." (Transcript of Parker's trial, at 669).

SR at 110). This hardly qualifies as inefficient, prejudicial cross-examination. See Martin v. McCotter, 796 F.2d 813, 818 (5th Cir. 1986). Accordingly, Claim I is denied.

CLAIM II

THE PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The petitioner argues that his trial counsel rendered ineffective assistance during the sentencing stage of the trial for the following reasons:

> (a) counsel failed to investigate and present evidence detailing Bush's sympathetic background, including his disadvantaged childhood and his traumatic prison experience,
>
> (b) counsel failed to investigate and present evidence of Bush's intellectual and psychological impairments,
>
> (c) counsel failed to investigate and present evidence to show that Bush did not kill or intend to kill,
>
> (d) counsel failed to investigate and present evidence to show that Bush's participation in the crime was the result of physical and psychological coercion, and
>
> (e) counsel failed to investigate and present evidence to show that Bush was intoxicated at the time of the offense.[17]

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[17]The record presented by the petitioner in this case is extensive. There is no doubt that much if not all of this potential mitigating testimony would have been relevant and could not have been excluded from consideration had it been presented. See Hitchcock v. Dugger, 481 U.S. 393 (1986); Skipper v. South Carolina, 476 U.S. 1 (1986). However, the relevancy of the evidence and the trial court's duty to allow its introduction do not have a bearing on the issue at hand, i.e. whether counsel acted reasonably in deciding not to introduce the evidence out of apprehension that it would do little for his client's chances while revealing possibly damaging details about his past. See Burger v. Kemp, 97 L.Ed.2d 638, 654 n.7 (1987).

To a large extent, grounds (b) - (e) are simply reassertions of grounds addressed in Claim I above. Mr. Muschott's decision not to pursue, further than he did, Bush's alleged psychological defects, mental deficiencies, incompetency, intoxication or coercion, etc., was supported by his reasonable, professional judgment. His decision to proceed as he did, without offering evidence in mitigation, was a deliberate one; it was not the result of oversight or ignorance. Under the circumstances of this case, the Court cannot say that such a decision fell beyond the wide range of competence demanded of attorneys in criminal cases." Strickland, supra at 687 and 690. See also Thomas v. Wainwright, 787 F.2d 1447, 1449 (11th Cir. 1986). As far as Muschott was concerned, to argue that Bush was intoxicated, or that he got in with a bad crowd that made him act against his will, or that he was mentally deficient while he committed the crimes, was to argue a falsehood or a set of falsehoods which would have proven ineffective. To switch strategies between the guilt/innocence phase and the sentencing phase would have cost him whatever credibility he had with the jury. This is especially true where, as here, the "evidence" of the defendant's psychological deficiencies was so weak.

Muschott did not believe that Bush suffered from any mental deficiency, nor did he have reason to believe so. Muschott did not believe that Bush was coerced into acting as he did; indeed, Muschott thought Bush to be a co-leader in the instant crime and a leader in a former one. The facts of which Muschott was aware painted Bush as a cold, remorseless man who was a major participant

in six atrocious crimes against two defenseless women within a few years of each other--one of which took place when Bush had barely been out of prison three years. Muschott weighed the very questionable beneficial value of a defense based on psychology against the very real threat that such a defense would open the door for the state to introduce, in rebuttal, the details of the 1974 rape and the damaging statements of Bush's co-defendants. He decided that the real threat outweighed the potential benefit. That decision did not render his representation constitutionally ineffective.

Likewise, petitioner's argument that Mr. Muschott failed to investigate his personal background is without merit. Contrary to his current counsel's assertion, this is not a case where the trial lawyer conducted no investigation whatsoever. Mr. Muschott discussed possible mitigating information with Bush, his brother and his father, on numerous occasions. He specifically discussed with them Bush's personal and family history. Muschott talked with Bush's girlfriend and his brother-in-law about the possibility of finding and presenting mitigating evidence. Muschott was well aware of Bush's poor family background and Bush's life in prison including the physical abuse to which he was subjected. However, both Bush's father and brother indicated that they did not wish to testify and Bush himself stated that he did not want his father to testify. No other family members came forward in Bush's behalf despite Muschott's willingness to talk with them. Muschott made an independent evaluation of the usefulness of the character and back-

ground information provided and decided that it was not significantly beneficial to his client's case. The decision was deliberate; it was not the result of oversight or ignorance. Again, Muschott weighed the possible benefits of this evidence against the rebuttal it invited and concluded that he and Bush were better off without them both. In a hearing before this Court, petitioner proffered the evidence of his background which he now suggests should have been offered in mitigation at his sentencing hearing. This Court considered that evidence and found it of little value. Muschott's decision not to offer it in mitigation was clearly within his discretion.

The trouble with Muschott's strategy is that Bush refused to follow it. After having succeeded in keeping the prosecutor from cross-examining his client and in leaving the state with only its "bare bones" argument, Muschott was prepared to urge upon the jury Bush's third statement to police. Therefore the last, and perhaps strongest, impression the jury would have had of Bush would have been in his favor. But Bush ruined it; he insisted on testifying. He waited for his counsel to construct the defense...and then he pulled the linchpin. Muschott made the bid, then Mr. Bush changed trumps. The effect was devastating. Even so, five jurors were swayed.[18]

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[18]Petitioner makes repeated reference to the claim that five of his jurors recommended he receive a life sentence in spite of his counsel's allegedly poor performance. It may very well be that he received those five votes only because of his counsel's thoughtful strategy. The point is that the 7-5 split does little, if anything, to bolster petitioner's argument that his counsel was ineffective.

Petitioner's poor performance at the sentencing stage cannot be blamed on his counsel. It is clear that the two of them agreed well before trial that Bush would not testify. Bush's last second decision to do so against the advice of counsel cannot now be twisted into an argument for ineffectiveness. See Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985) (when a defendant preempts his attorney's strategy by insisting on a different defense, no claim for ineffectiveness can be made).

The Court finds that Muschott's decisions were supported by reasonable professional judgment. Mr. Muschott's decision not to offer evidence of Bush's purportedly good character was a sound, strategic one in light of his reasonable belief (confirmed in the hearing before this Court) that the state would have introduced evidence of Bush's violent past and facts regarding his prior conviction in rebuttal. Having thoroughly discussed the matter with Bush's closest relatives and learned of their reluctance to testify on Bush's behalf, Muschott's decision not to pursue the investigation further was not unreasonable. See Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988); Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985). While Muschott might have conducted a more thorough investigation into possible mitigating evidence, "in considering claims for ineffective assistance of counsel, '[the court] address-[es] not what is prudent or appropriate, but only what is constitutionally compelled.'" Burger v. Kemp, 97 L.Ed.2d 638, 657 (1987) quoting United States v. Cronic, 466 U.S. 648, 665 n.38 (1984). The Court is mindful that "strategic choices made after less than

complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. Applying this standard to the case at bar, the Court finds that the decisions made by Muschott were supported by reasonable professional judgments and that there was a strategic basis for his decision not to present any mitigating evidence at the sentencing phase of the trial. Claim II is therefore denied.

CLAIM III

THE PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HE WAS INCOMPETENT TO STAND TRIAL.

Claim III intermingles several claims. Petitioner asserts that he was incompetent to stand trial; that he never received a Pate v. Robinson hearing at which incompetency would have been established; and that his counsel was ineffective by allowing an incompetent man to stand trial. Petition, at 107-31. Muschott's alleged ineffectiveness in this regard is adequately considered in Claim I, grounds (a) and (e) above. Petitioner's alleged "incompetency" is the same claim considered and rejected by the Florida Supreme Court on collateral attack. To reiterate: the court concluded that there was absolutely no evidence suggesting that Bush was incompetent to stand trial. Bush, 505 So.2d 409, 410-11 (Fla. 1987).

The 11th Circuit recently reiterated the circumstances under which incompetency should be considered in a habeas petition:

> Claims of competency to stand trial should not be considered in habeas corpus proceedings unless the facts are

> 'sufficient to positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to the mental capacity of the petitioner to meaningfully participate and cooperate with counsel during a criminal trial.'

Rivers v. Turner ___ F.2d. ___ (11th Cir. June 6th, 1989) quoting Bruce v. Estelle, 483 F.2d 1031, 1043 (5th Cir. 1973), subsequent opinion, 536 F.2d 1051 (5th Cir. 1976) cert. denied, 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1977).

Prior to filing this habeas petition, the petitioner had not presented any evidence to overcome the finding of the Florida Supreme Court with regard to competence. Herein, he relies primarily on the testimony of a "Dr. Carbonell" who, after reviewing Bush's background and subjecting him to a battery of intellectual and psychological tests, decided that he did not have an "anti-social disorder," (H. at 91), and was not retarded (H. at 96), but that he had learning deficits which she felt were indicative of brain damage. (H. at 98-101). She also concluded that Bush had an "extreme emotional disturbance" at the time of the murder (H. at 106-07) and that he was without the capacity to conform his conduct to the requirements of law (H. at 108). In a report requested by Mr. Bush's current counsel, Carbonell wrote that he may have been incompetent to stand trial because his verbal deficiencies precluded him from understanding words and concepts like "premeditation," "felony murder" and "accomplice liability," and because Bush could not understand why he was being tried for murder when he did not pull the trigger. (Petition at 130, citing Appendix O). In testimony before this Court, Dr. Carbonell said that she believed

Bush to be a passive, "sheep-like" follower who acted under the "substantial domination" of the other defendants. (H. at 111-114). She admitted, however, that Bush's competency was difficult to assess in retrospect. (H. at 142, Petition at 128, citing Appendix O). Her examination was conducted more than five years after the fact.

Dr. Carbonell's conclusions regarding petitioner's verbal deficiencies and possible brain damage were consistent with those of a "Dr. D'Amato" who examined Bush before April 18, 1986, also at the request of Bush's appellate counsel. D'Amato's findings were available to the Florida Supreme Court when it considered, and ultimately rejected, Bush's collateral attack. D'Amato's letter to that counsel indicates that although Bush maintained a "venier [sic] of coldness and toughness," he was cooperative and "able to develop a rapport" with his examiner. State's Exhibit NN, at 6). D'Amato wrote that Bush:

> does not experience any illusions, auditory or visual hallucinations, or other types of hallucinations....
>
> [He] was oriented to time, place, and person and sensorium was intact....His thought content was void of obsessions, compulsions, phobias, derealization, depersonalization, suicidal ideation, homicidal ideation, delusions, ideas of reference, and ideas of influence. His stream of thought as manifested by his speech is free from any associational disturbances.

Id. The Florida Supreme Court wrote that Bush's

> newly appointed psychiatric expert offers only weak support to Bush's claims. The numerous psychological problems now pointed out, such as learning disabilities, a passive and dependent personality, and possible 'diffuse organic brain damage' do not, when taken together, sufficiently raise a valid question as to Bush's competency to stand trial (cites omitted).

Bush v. Wainwright, 505 So.2d 409, 410-11 (Fla. 1987). This conclusion was correct; and, contrary to petitioner's apparent belief, it is not rendered otherwise by the submission of yet another psychiatrist to second Dr. D'Amato's opinion. Upon independent consideration of the expert testimony presented throughout this case, both before and since the Florida Supreme Court's decision, and in light of the record itself, this Court does not find that Bush has raised a doubt about his competence sufficient to merit a reopening of the issue on appeal.

Without repeating all of the factors considered in Claim I (a) and (e), above, (attesting to Bush's competency to stand trial) the Court simply incorporates them here by reference and notes, again, that petitioner's attorney, Muschott, testified that Bush had no problems communicating, gave no indication that he was out of touch with reality during the crime or at trial; appeared to understand the incriminating nature of his conduct; and displayed average intelligence. (H. at 355, 390-91). Since the petitioner has raised no serious doubt about his ability to participate meaningfully in his own defense during trial, Rivers directs this Court to give the claim no further consideration. Claim III is denied.

CLAIM IV

THE PETITIONER WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER AKE V. OKLAHOMA AND THE FIFTH, SIXTH AND EIGHTH AMENDMENTS, WHEN THE DEFENSE PSYCHOLOGIST APPOINTED TO EVALUATE HIM BEFORE TRIAL FAILED TO CONDUCT A COMPETENT AND APPROPRIATE EVALUATION.

Next, Bush contends that Dr. Tingle's inadequate psychiatric evaluation deprived him of his fifth, sixth, eighth and fourteenth amendment rights as articulated in Ake v. Oklahoma, 470 U.S. 68 (1985). In Ake, the trial court denied a defendant's request for a psychiatric examination to determine the defendant's sanity at the time of the offense. The United States Supreme Court reversed finding that:

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 83. However, the Supreme Court cautioned that:

> A defendant's mental condition is not necessarily at issue in every criminal proceeding, however, and it is unlikely that psychiatric assistance ... would be of probable value in cases where it is not. The risk of error from denial of such assistance, as well as its probable value, are most predictably at their height when the defendant's mental condition is seriously in question. When the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent.

Id. at 82-83.

Here, the appointment of Dr. Tingle was not required under Ake. Bush made no showing whatsoever that his mental condition or

sanity was going to be in issue. See Motion for Appointment of Psychiatrist and Psychologist, R. 1502, and Order granting motion, R. 1526. Bush exhibited no behavior which would have led his counsel, the police or the trial court to question his competency or sanity. Without some form of preliminary showing, a defendant is not entitled to the appointment of psychiatric assistance. Id. at 82-83. See also Clark v. Dugger, 834 F.2d 1561, 1564 (11th Cir. 1987).

This being the case, the Court finds that Bush was not prejudiced by Dr. Tingles' performance in this case. Bush's counsel discussed all the facts he had gathered about Bush and the crime with Dr. Tingle. Following this discussion, both men concluded that Bush's sanity and competency would not be an issue in the case. As discussed in Claims I and II, this decision was not unreasonable. Dr. Tingle's failure to pursue the psychiatric examination further was the result of Bush's counsel's reasonable tactical decisions.. Since Bush failed to make the preliminary showing that competence might be at issue, he was not entitled to a psychiatric exam in the first place. The fact that his counsel sought the input of a psychiatrist to the extent that he did hardly establishes Mr. Bush's claim that an examination to which he was not entitled was insufficient. The Court finds that Bush's rights under Ake were not violated and Claim IV is therefore denied.

CLAIM V

THE PETITIONER'S SENTENCE OF DEATH CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT BECAUSE THE STATE COURT RECORD IS DEVOID OF A FINDING OF HIS INDIVIDUAL CULPABILITY.

Bush claims that his sentence of death is cruel and unusual because the trial court did not find he was individually culpable for the murder. Petition, at 142-53. As controlling precedent, petitioner cites Tison v. Alabama, 107 S.Ct. 1676 (1987); Cabana v. Bullock, 106 S.Ct. 689 (1986); and Enmund v. Florida, 458 U.S. 782 (1982). In Enmund, the United States Supreme Court held that the Eighth Amendment forbids the imposition of the death penalty against "one...who aids and abets a felony in the course of which a murder is committed...but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force...be employed." Enmund at 797, 102 S.Ct. at 3376. In Bullock, the Court indicated that such a finding need not be reached by a jury, but may be made by an "appropriate tribunal--be it an appellate court, a trial judge, or a jury." Bullock at, 102 S. Ct. at [illegible].[19] In Tison, the Supreme Court declined to enumerate each and every particular type of conduct and state of mind that warranted the death penalty but concluded, "simply," that major participation in the felony committed combined with a reckless indifference to human life was sufficient to satisfy Enmund's requirement of culpability. Tison at 1688. It is clear in the instant case that,

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[19]While noting that this finding could be made in either federal or state court, the Supreme Court stated that the latter alternative would be the "sounder one."

if not the trial judge, certainly the appellate tribunal found Bush to be a major participant in the underlying felonies committed. Tison suggests, therefore, that the imposition of the death penalty is justified if either found Bush to manifest even "reckless indifference" to human life, let alone an intention to take it.

In the instant case, this determination was made expressly by both the trial judge and an appellate tribunal, and implicitly by the jury. In the course of sentencing Bush, the trial judge stated:

> The evidence that was presented in this case is that you were together with these other people during this entire evening, that it was your car, that you were doing all the driving and that it was your weapon. The evidence then shows that when you stopped down in that road you and Parker got out of the car and took the girl back and between the two of you you did her in.
>
> You took the first step by stabbing her. You said you did not intend to kill her. Apparently the jury disbelieved that and I am privileged to disbelieve it as well. In any event, what you did, stabbing her, making her fall to the ground, facilitated and cooperated with Parker in what he did next, and therefore in my opinion there is no way to say what you did was relatively minor-
> ....

(R. at 1305). Despite the trial judge's refusal to accept Bush's claim that he lacked the requisite intent and despite that same judge's determination that Bush was a major participant in the murder and its underlying felony, Bush appealed his sentence to the Florida Supreme Court claiming an Enmund violation.[20] On appeal,

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[20]Petitioner might have alleged that the trial judge did not make his finding with sufficient specificity since the passage quoted in the text above arises within the trial judge's discussion of possible mitigating factors. Such an allegation would be futile however, since the appellate tribunal, the Florida Supreme Court, made an express finding of its own which satisfied Enmund. See text, below.

Florida's Supreme Court wrote:

> the facts of this case show that Bush was a major, active participant in the convenience store robbery and [that] his direct actions contributed to the death of the victim. The degree of Bush's participation is sufficient to support a finding that his involvement constituted the intent or contemplation required by Enmund (emphasis added)."

Bush v. State, 461 So.2d 936, 941 (1984).[21] By proffering Tison purportedly in his defense, Bush and his appellate counsel seem to suggest that intent plus major participation will not sustain imposition of the death penalty without an additional, specific finding of reckless indifference. This is absurd. But the Court is at a loss to glean anything else from the proffer. Both the trial judge and the appellate tribunal found intent: the former said that the jury had apparently disbelieved Bush's claim that he lacked intent and that he, the trial judge, was privileged to do the same; the latter found that petitioner's direct actions contributed to the death of the victim and that the degree of his participation supported the finding of intent required by Enmund. Accordingly, petitioner's Enmund claim must fail and Claim V is denied.

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[21] It is significant to note that the Florida Supreme Court prefaced the above quoted passage with the following language: "We disagree with [Bush's] contention on the facts of this case-....The facts of this case show...." Bush v. State, 461 So.2d 936, 941 (Fla. 1984). In other words, the court was able to make an independent finding of its own, based on the facts of the case and not simply the lower court's conclusions, that Bush possessed the requisite intent to satisfy Enmund. Thus even if Bush were able to undermine the trial judge's conclusions by reference to Enmund, the Florida Supreme Court's independent findings would, and do, render any Enmund objections frivolous.

CLAIM VI

THE PETITIONER'S CAPITAL TRIAL AND SENTENCING PROCEEDINGS WERE RENDERED FUNDAMENTALLY UNFAIR AND UNRELIABLE, AND VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, DUE TO THE PROSECUTION'S DELIBERATE AND KNOWING PRESENTATION AND USE OF FALSE EVIDENCE AND ARGUMENT AND INTENTIONAL DECEPTION OF THE JURY, THE COURT, AND DEFENSE COUNSEL.

The petitioner maintains the prosecution knowingly utilized false evidence in order to acquire a verdict of "guilty" and a sentence of death. Specifically, he claims that the prosecution introduced into evidence the .38 caliber bullet it found beneath the driver's seat of his car but hid a report by Donald E. Champagne, an analyst with the Florida Department of Law Enforcement's Regional Crime Lab, which stated "[the bullet fragment found in the victim's head] appears to be a .32 caliber class plain lead alloy

bullet."[22] Bush contends that the state "hid" a report by Detective Tom Madigan which reviewed Champagne's findings and concluded that the fatal wound was not inflicted by a .38 caliber bullet. See Deposition of Tom Madigan, Appendix LLL to the Petition, at 44. He also claims that the prosecution was aware of statements made by his co-defendants to the effect that Parker shot Slater, while Bush only stabbed her, but that they attempted to prove he was the shooter, nonetheless.

Although the state presented no evidence during trial to suggest that Bush was the shooter, in closing argument after the guilt phase, the prosecutor made the following comments:

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[22]The report reads in full as follows:

RESULTS:

Exhibit #1

This is a badly damaged and distorted portion and fragment of what appears to be a .32 caliber class plain lead-alloy bullet as loaded to center fire revolver type cartridges. Remaining weight is approximately 77.3 grains. There is so much overscoring of the bearing surface that the probable make of weapon involved could not be determined. This bullet is of no identification value.

Exhibits #2, #3 and #4

These revolvers have been tests fired using some of the ammunition supplied. They were all found to be functional. The tests have been compared microscopically with the bullet, exhibit #1, with negative results.

REMARKS:

The exhibits will be returned.

See Appendix III to the Petition for Writ of Habeas Corpus.

> You heard the first statement; he denied everything. You heard the second statement; he admits being there. You heard the third statement; he admits participating. You heard the fourth statement; he admitted stabbing. He didn't make a fifth statement and I don't know what it would be and it would be unfair for you to speculate what it would be. But I do know that they recovered from his car on the driver's side in the front seat a .38 bullet. They didn't recover it from the back seat where Mr. Cave was. They didn't recover it from the right front seat on the passenger's side where Mr. Parker was, and they didn't recover it from the right back side where "Bo Gator" was. They recovered it from where Mr. Bush was sitting the entire night driving that car. That's where the bullet came from.

(R. at 980).

> Whose gun was taken with the gang in order to rob? Was it J.B. Parker's, as Mr. Muschott would suggest, that he was the ringleader? Was it Parker's? Was it Cave's? Was it Johnson's? No, it was John Earl Bush's. He described it as a .38 caliber gun. He described it in another statement as a .38 special. Remember what Mr. Nippes told you. This is a .38 Special. This is a live round. State's Exhibit Number 22 [the photograph of the gunshot wound] This is what happens when a live round is fired by John Earl Bush and smashes into the skull of Frances Julia Slater.

(R. at 992).

It is axiomatic that the state has a duty not to present or use false testimony and not to exploit false testimony by urging the jury to accept the truth of what it knows to be false. See Giglio v. United States, 405 U.S. 150 (1972); Brown v. Wainwright 785 F.2d 1457 (11th Cir. 1986); United States v. Sanfilippo, 564 F.2d 176 (5th Cir. 1977). However, not every use of false evidence entitles a defendant to relief. Brown, 785 F.2d at 1465. Before a defendant is entitled to relief, he must prove that the false evidence was "material" in obtaining his conviction or his sentence or both. Id. at 1465. Evidence in a case is "material" when "there

is 'any reasonable likelihood that the false [evidence] could have affected the judgment of the jury.'" Id. at 1465-66 quoting United States v. Bagley, 473 U.S. 667, 678 (1985) (plurality opinion). In the instant case there is no indication that the prosecutors presented false evidence; and the reputedly false "argument" which they made had no material effect in obtaining Bush's conviction or sentence.

First, even if the state urged a conclusion it could not support (i.e., that Bush shot the victim), the jury was not presented with false evidence. The evidence presented consisted of (1) Dr. Wright's opinions, (2) the live bullet, and (3) the photographs. Dr. Wright's testimony was consistent with Champagne's crime lab report. Both concluded that a positive determination of the caliber of the bullet could not be made and that the fragment was consistent with a .32. Bush does not contest the authenticity of the bullet or the photographs and he admitted that it was his gun that Parker used in the shooting.

Second, none of the evidence discussed above was "hidden" from the defense. Det. Madigan's testimony and the statements of Bush's co-defendants were available and known to Bush's counsel prior to trial. Det. Madigan's deposition was taken by counsel for Bush's co-defendants for Bush's case. Det. Madigan had a copy of Champagne's report at the deposition and even quoted from it during his testimony. See Deposition of Madigan at p.43. Mr. Muschott, while not present, was aware of the deposition and waived his right to cross. See Id. at p.2. During the guilt phase, the state

called Dr. Wright, the pathologist who conducted the autopsy on the victim's body. On direct, Dr. Wright testified that the bullet fragment was "consistent with being a .38" (R. 469). On cross, Muschott elicited from him the following information:

> Q. Okay. Um-m, you have indicated the fragments that you removed of the projectile were consistent with .38 caliber. Were they consistent with any other caliber?
>
> A. It [the bullet fragment] could have been a .32. The bullet here has been so badly flattened out and portions of the bullet have been lost because it disintegrated in such small pieces that they could not be recovered, that it is difficult to be certain whether it's a .32 or a .38. The general size is more consistent with a .38 than it is with a .32.
>
> Q. You're telling us that you can't be certain at this point what the caliber was?
>
> A. That is precisely correct.

(R. at 472-73). Moreover, Muschott was well aware of the statements made by the co-defendants and actually worked to prevent their introduction at trial.

Bush's argument here boils down to whether the prosecutor's comments cited above were material to the jury's decision in this case. In other words, whether there is any reasonable likelihood that the comments could have affected the jury's judgment. See Bagley, 473 U.S. at 678. The Court finds there is not. See also Claim I, grounds (c) and (f) above. It is clear from the record that the prosecutors were proceeding under two theories of first degree murder: felony murder and the aiding and abetting of premeditated murder. (R. at 989). Nowhere in the evidentiary phase of the trial or the sentencing did the prosecutor's attempt to put on evidence depicting Bush as the shooter. They depicted him as the

get-away driver, car owner, once-convicted felon and owner of the murder weapon. But they did not depict him as the shooter. They did not have to.

The petitioner's error is his assumption that without evidence proving he pulled the trigger he could not be convicted or sentenced to death:

> Stone and Midelas knew that they were presenting a lie to Mr. Bush's jury. They deliberately presented it because they knew that Mr. Bush's pretrial statements alone were not enough for a capital conviction and death sentence. They needed the false 'shooter' theory to assure a first degree murder conviction and sentence of death.

Petition, at 172. Midelas himself informed the jury otherwise: "to establish the evidence required for a verdict of first degree murder, [Bush] didn't have to stab her, he didn't have to touch her." (R. at 989). And as the court would later inform the jury, in order to find John Earl Bush guilty of first degree felony murder they only needed to find that Francis Slater was dead, that her death occurred as a consequence of and while John Earl Bush and an accomplice were escaping from the immediate scene of a violent felony, and that, although the accomplice had done the killing, Mr. Bush aided, abetted, counseled, or otherwise procured the commission of the felony. (R. at 1007). There was ample evidence of Bush's participation in the robbery and of the aid he rendered in all of the crimes committed that evening to find him guilty of first degree murder. There was no need for the prosecutors to fabricate any "false shooter" theory. And, indeed, the evidence precluded them from doing so.

The only statement by the prosecution which suggested that Bush was the shooter was offered within a context designed to outline the state's case against Bush for felony murder based on his participation in the robbery and kidnapping. (R. at 989-1003). The felony-murder doctrine allows the guilt of he who pulls the trigger to be assessed against those who facilitated the violent felony during the course of which the trigger was pulled. In other words, it holds them each liable for the murder. In context, the prosecutor's statement simply equated Bush's actions with Slater's death in a manner contemplated by the doctrine of felony murder. The statement was figurative, not literal. None of the evidence showed Bush to be the shooter. The prosecutor argued that he did not have to prove Bush was the shooter; Muschott argued that Bush was not the shooter; the trial judge concluded that the only evidence they had showed Bush not to be the shooter and there is no indication that the jury ever had any misapprehensions about Bush's role in the crimes.

In closing, Muschott repeated the scenario Bush maintained consistently throughout the ordeal:

> Dr. Wright testified that this stab wound was not a fatal wound, that this woman died as a result of the gunshot wound that was inflicted by "Pig" Parker and not as a result of the stab wound.

(R. at 964).

> [Bush's] statements show that this incident occurred as a result of "Pig" and Alphonso Cave abducting, robbing the victim in this case, Francis Julia Slater at gunpoint, robbing her at gunpoint, abducting her and taking her out of the store, putting her in Bush's car.... [T]he weapons were in the possession of Parker. Parker had the gun.

(R. at 969).

> After she fell, Parker took the gun and shot her in the back of the head, the fatal wound. That was the murder. That was the homicide in this case.

(R. at 969-70).

> There's no question from the evidence that this girl was shot by "Pig" Parker and I don't believe there is any question from the evidence that the weapons were wielded by Parker, and wielded by Cave. Bush did admit that he stabbed the girl, but there is no doubt from the evidence that the stab wound was not fatal.

(R. at 970).

It was after Muschott made these statements that the prosecutors made the assertion about which Bush now complains. It was made during Mr. Midelas's explanation of the state's felony murder argument. (R. at 992). Upon conclusion of Mr. Midelas's argument, Mr. Muschott asked the jury:

> What do you think would have happened to that girl in the hands of Parker and Cave if Bush had not driven that car away from that location? Buying time, hoping in vain someway this situation would resolve itself. it didn't. It resolved itself by "Pig" parker shooting this girl in the back of the head, not in response to anything Mr. Bush said, not in response to anything Mr. Bush did, but in response to "Pig" Parker's robbery, in response to "Pig" Parker's and Cave's abduction of the girl and in response to "Pig" Parker's knowing that the girl could identify him.

(R. at 1003).

Based on the lack of any evidence to contradict Bush's own statements as to the role he played in Slater's murder, the lack of any evidence suggesting that he shot Slater, the prosecutor's reliance on the felony-murder argument and insistence that he did not have to prove that Bush even touched Slater, the context in

which the questionable statement was made, Muschott's arguments to the jury, the judge's instructions to the jury regarding felony murder, the judge's express finding that no evidence implicated Bush as the shooter, and, finally, the lack of any evidence to show that the prosecutors admitted and relied on evidence they knew to be false, the Court finds there is no reasonable likelihood that the questionable comment made by the prosecutor could have affected the judgment of the jury at the guilt/innocence or the sentencing phase of Mr. Bush's trial.

The only relevant evidence added during the sentencing phase was that proffered by Mr. Bush himself.[23] This was consistent with Bush's prior statements to the effect that Parker had shot Slater. The prosecution made no further comments regarding who pulled the trigger, and Muschott simply repeated what he and Bush had maintained all along. (R. at 1283). Since the state did not use false evidence against Mr. Bush nor seek to hide exculpatory evidence from him; and since the prosecutor's one statement suggesting that Bush fired the weapon was not material, Claim VI is denied.

CLAIM VII

> THE PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS BECAUSE THE FLORIDA SUPREME COURT REFUSED TO REVIEW CERTAIN OF HIS CLAIMS THE COURT FOUND PROCEDURALLY BARRED.

The petitioner claims that his prosecutors conspired to conceal evidence from him and that, once the evidence surfaced, the

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[23]The prosecution attempted to introduce a statement by Parker to the effect that Bush had shot Ms. Slater, but Mr. Muschott successfully objected to its introduction and it was not presented to the jury. (R. at 1166-71).

Florida Supreme Court refused to consider it since petitioner had not presented it on direct appeal. Petition, at 175-88. A review of the record reveals the Florida Supreme Court refused to consider four claims the petitioner raised on collateral attack but which the court found to be procedurally barred.[24] The only one dealing with the suppression of evidence was Claim IV (of the collateral attack) which the trial judge considered and dismissed on its merits: Petitioner claimed: "THE STATE MATERIALLY MISLED THE JURY BY PRESENTING AND ARGUING FACTS WHICH IT KNEW TO BE FALSE, AND WHICH TOTALLY CONTRADICTED THE PROSECUTOR'S THEORY IN CO-DEFENDANTS' CASES, IN VIOLATION OF DEFENDANT'S FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS." See Initial Brief of Appellant, State Court Collateral Proceedings, at ii. Specifically, the petitioner claimed the prosecution implicated him as the shooter before the jury when there was no evidence whatsoever to suggest that he had pulled the trigger. To solidify its argument, the prosecutors informed Bush's jury of the .38 caliber bullet found in the front seat of his car but hid from the jury a forensics report which concluded that the victim had been killed by a .32 caliber weapon. This is precisely the argument raised in CLAIM VI, above. See also Claim I, ground (c). Because this Court considered the claim on its merits and decided that it is meritless, it need not address the Florida Supreme Court's determination that the claim was procedurally barred. See Wainwright v. Sykes, 433 U.S. 72 (1977); Smith v. Murray, 477 U.S. ___, 106 S.Ct. 2662, 91 L.Ed.2d 434

[24]The four claims are enumerated in footnote 2 above.

(1986); Murray v. Carrier, 477 U.S. ___, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986).

CLAIM VIII

THE PETITIONER WAS DENIED HIS RIGHT TO AN INDIVIDUALIZED AND FUNDAMENTALLY FAIR AND RELIABLE CAPITAL SENTENCING DETERMINATION BECAUSE THE STATE INTENTIONALLY RELIED UPON VICTIM IMPACT, COMPARABLE WORTH, AND OTHER IMPROPER FACTORS IN ITS EFFORTS TO OBTAIN A SENTENCE OF DEATH.

The petitioner claims the prosecutors referred to the victim's family during voir dire and in closing argument in a manner forbidden by the U.S. Supreme Court's decision in Booth v. Maryland, 482 U.S. 496 (1986). He alleges that his prosecutors elicited sympathy from the jury by express references to Francis Slater's family and to the effect her murder had on them. During voir dire, the prosecutors directed the following inquiries at the jury panel:

> The fact that the victim in this case may be a person who is somewhat famous in the fact that she is the granddaughter of a famous person, Frances Langford, and of course, Ralph Evinrude, would that in anyway effect you in rendering your verdict in this case? Would you tend to give this man any less of a fair trial?
>
> Now the victim's parents are Richard and Salli Campbell from Jenson Beach. Mr. Campbell is in the newspaper business there. They are seated in the courtroom and they will be here throughout the trial. They are seated over on the back row. Mr. and Mrs. Campbell back there.
>
> Now, the fact that they may be here during the course of this trial and the victim in this case was their daughter and you will see them at recess and during breaks, would that cause you to in anyway have any effect whatsoever on your verdict in this case? You would listen to the evidence and that law only and not who the victim is or who she's related to. Could each of you do that? Would any of you have any problem with that whatsoever?

(R. at 32-33). The prosecutors made four more similar statements

throughout the course of voir dire and during arguments before the jury. (R. at 59, 214, 278 and 315).

During opening argument for the guilt phase, the prosecutor stated that "she [Slater] was shot in the back of the head with a fatal wound. Just two days before her 19th birthday." (R. at 332). During closing argument of the guilt phase, he explained:

> [O]n Monday night, April 26th, at approximately ten o'clock, Bush and his gang were sitting in Fort Pierce drinking, planning to rob. And Frances Slater was at home with her twin sister watching television. That shortly thereafter, the Bush gang left Fort Pierce with the intent to rob and drove to Stuart, and about 10:40 arrived at the Little Saints Store in Stuart. Frances Slater was lying on the carpet in front of the television, watching TV.

(R. at 973). Later in the argument, he added:

> Now, Mr. Stone and I do not represent the Campbell family. It was their daughter who was killed. We represent the State of Florida. What this defendant did on the night of April 26th, the early morning hours of April 27th is a crime against all of the people of the State of Florida and that's who Mr. Stone and I represent.

(R. at 998). Finally, during the closing argument at the sentencing phase, the prosecutor argued:

> I know its natural to have sympathy in situations like this. I don't think there is any question about that. I think certainly you have heard the evidence in this of the previous trial and we talked about sympathy at that point.
>
> * * *
>
> But I submit to you that sympathy, I sympathize with John Earl Bush, anybody would sympathize with John Earl Bush when he is being faced with something like this, but nevertheless, John Earl Bush put himself here. I didn't put him here, you didn't put him here. And you have taken an oath that as a juror you will base your advisory sentence on what you heard in this trial and not on sympathy, because I asked you don't consider the sympathy that Mr. and Mrs. Campbell have. Don't consider that

> when Mr. and Mrs. Campbell sit down to Thanksgiving dinner just three days from now that they are going to look across the table and they are going to see Frances Julia Slater, the identical twin sister. If sympathy had any part in it, think of what they go through. And every time they sit down and look at her, this whole incident is going to come back...

(R. at 1279-80).

In Booth, the Supreme Court addressed the constitutionality of a Maryland statute that required consideration of a presentence investigation containing a "victim impact statement" during the sentencing process in all felony cases. The victim impact statement described in detail the effect of the crime on the victims and families based on information supplied by the victims and their families. The statements contained basically two types of information: (1) the personal characteristics of the victims and the emotional impact of the crime on their families, and (2) family members' comments and opinions regarding the outstanding personal qualities of the victim, the serious emotional problems suffered by the family, and the family members' perceptions of the crime, i.e. that their parents were "butchered like animals."

The Supreme Court found that the formal presentation of such information to a capital sentencing jury could "serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." Id. at 508. The Court concluded that admission of such information created an unacceptable risk that a jury might impose a death sentence in an arbitrary and capricious manner thereby undermining the reasoned decisionmaking required in capital sentencing

cases. Id. at 508-9. For this reason, the Court held that the introduction of the victim impact statement at the sentencing phase of trial violated the eighth amendment.

The Supreme Court revisited Booth recently in South Carolina v. Gathers, ___ U.S. ___, 57 U.S.L.W. 4629 (June 12, 1989). In Gathers, the prosecutor read to the sentencing jury extensive portions of a religious tract found in the victim's possession. The prosecution also made reference to the victim's voter registration card in effort to paint him as a patriotic American. The Supreme Court affirmed the South Carolina Supreme Court's determination that this line of argument violated Booth. It encouraged the jury to focus on factors unknown to the defendant, irrelevant to the offense and which were offered, primarily, to diminish the worth of the defendant in light of that of the victim.

Upon review of the record in this case, the Court finds that prosecutorial comments did not violate Booth or Gathers. The comments made during voir dire or the guilt phase of the trial did not involve Booth information. All of the questions asked during voir dire related solely to the identity of the victim and her family--information that would have, and did, come out at trial. Booth does not purport to preclude a prosecutor from determining whether the jurors would be prejudiced knowing the case involved a well-known family. This inquiry was necessary and proper to assure that the defendant obtained a fair trial. Prosecutorial reference, during the sentencing phase, to the pain felt by the victim's family did not rise to the level of a Booth violation in this case

either. Comparing the victim impact statement presented to the jury in Booth and the statements read to the jury in Gathers with the single comment made by the prosecutor in this case, the Court finds a material difference in the scope of the information provided and the likely effect of the information on the respective juries. The victim impact statement in Booth contained extensive and emotionally charged details about the family and the victim and about each of their reactions to the crime. The passages read to the jury in Gathers were prayer-like invocations, requests for humility and strength with which to weather the storms God allowed in the lives of the insignificant. Some jurors may have even found the passages poetic.

In comparison, Bush's prosecutor made a single comment during the close of his argument in reference to the family's loss. The jury was already fully aware of that loss--fully aware that Francis Slater would be missed during the upcoming Thanksgiving holiday. The prosecutor added nothing to its knowledge; he did not attempt to compare the "worth" of the victim with that of the defendant; he did not inform the jury of irrelevant facts about the victim's accomplishments, dreams or desires; he did not read to them specific statements from family members about what the loss of the victim meant to them. In short, he did not create the risk that the petitioner's death sentence was based on constitutionally impermissible or irrelevant considerations in violation of the eighth amendment. Bush's sentence was directly related to his culpability

in the offense. The prosecutor did not violate Booth. Accordingly, Claim VIII is denied.

CLAIM IX

THE PETITIONER WAS DEPRIVED OF EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY PROSECUTORIAL COMMENTS AND JUDICIAL INSTRUCTIONS WHICH DIMINISHED THE JURORS SENSE OF RESPONSIBILITY DURING THE SENTENCING PHASE OF HIS TRIAL.

The petitioner claims that the jury was misled about its proper role in the sentencing phase in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Petition, at 199-206. In Caldwell, the United States Supreme Court held that prosecutorial remarks which misinformed the jury as to the role of appellate review in a capital case violated the eighth amendment. Id. at 336, 105 S.Ct. at 2643 (plurality); id. at 341-42, 105 S.Ct. at 2646 (O'Connor, J., concurring in part and concurring in judgment). In the instant case, the petitioner faults his prosecutors for informing the jury that its role in the sentencing phase was "advisory," (Petition, at 201-202), that reasonable doubt was a guilt/innocence standard which played no part in the sentencing phase (Petition, at 202), that the advice was to be given without sympathy, (Petition, at 203), and that the final responsibility for imposing sentence rested with the judge, (Petition, at 203-04). Petitioner's claim is procedurally barred pursuant to Dugger v. Adams, 109 S.Ct. 1211 (1989) which dealt with the following facts.

In October of 1978, Audrey Dennis Adams, Jr. was convicted of first-degree murder by a Florida jury which recommended that he be sentenced to death. The death sentence was imposed and affirmed on

direct appeal by the Florida Supreme Court. Adams v. State, 412 So.2d 850 (Fla. 1982). The United States Supreme Court denied certiorari. 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982). The trial court subsequently denied Adams' first motion for post-conviction relief pursuant to Fla.R.Cr.P. 3.850, and the Florida Supreme Court affirmed. Adams v. State, 456 So. 2d 888 (1984). Adams filed a federal habeas petition which the district court denied on September 18, 1984. Adams v. Wainwright, No. 84-170-Civ-Oc-16 (M.D. Fla.). The Eleventh Circuit affirmed, 764 F.2d 1356 (1985), and the U.S. Supreme Court denied certiorari again. 474 U.S. 1073, 106 S.Ct. 834, 88 L.Ed. 2d 805 (1986). Up to that time, Adams had not alleged that his judge or his prosecutor had done anything to diminish the jury's sense of responsibility regarding its sentencing recommendation.

In the meantime, however, the United States Supreme Court decided Caldwell. Adams filed a second 3.850 motion and alleged, for the first time, that his trial judge had violated Caldwell by instructing the jurors on numerous occasions that the sentencing responsibility was solely his and by failing to tell them that he could override their sentencing recommendation in limited circumstances only. Dugger v. Adams, 109 S.Ct. at 1214. The Florida Supreme Court refused to consider Adams' claim because it could have been raised on direct appeal and was therefore procedurally barred under Florida law. Adams v. State, 484 So.2d 1216, 1217, cert. denied, 475 U.S. 1103, 106 S.Ct. 1506, 89 L.Ed. 2d 906 (1986).

Adams filed a second federal habeas petition in which he asserted his Caldwell claim. The district court also found the claim to be procedurally barred and, in the alternative, ruled that it was meritless. Adams v. Wainwright, No. 86-64-Civ-Oc-16 (M.D. Fla., Mar. 7, 1986). The Eleventh Circuit reversed, Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified on denial of rehearing, 816 F.2d 1493 (1987) and held that Adams' Caldwell claim was not procedurally barred since it was novel at the time of his trial in 1978. The Court went on to consider the claim and ultimately granted the habeas petition on its merits. See Dugger v. Adams, 109 S.Ct. at 1214.

The United States Supreme Court reversed on the ground that Adams' claim was procedurally barred. Id. In summary, the Court reasoned as follows: a Caldwell violation arises when a jury is improperly instructed about its role under local law. Thus, to rule the way it did on the merits, the Eleventh Circuit must have concluded that the remarks in question were error under Florida law. Id. at 1215. To reach that conclusion, however, was to conclude that objections to those remarks existed at the time the remarks were made, i.e., they did not arise under some novel 1985 interpretation of the eighth amendment. Since Florida law bars a petitioner from raising claims which could have been but were not raised on direct appeal, Adams' Caldwell claim was procedurally barred. Id. at 1216. The conclusion to be gleaned is that state

law determines whether the issue is procedurally barred.[25] In the instant case, the Florida Supreme Court has already decided that Bush's Caldwell claim is procedurally barred. See Bush v. Wainwright, 505 So.2d 409, 410 (Fla. 1987). Accordingly, this Court will not consider it.

CLAIM X

PETITIONER'S STATEMENTS TO LAW ENFORCEMENT PERSONNEL WERE OBTAINED IN VIOLATION OF MIRANDA V. ARIZONA AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Next, the petitioner claims that the four statements he gave to law enforcement officers were obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966). This is the same claim made and rejected during trial, and made and rejected on appeal.[26] Upon independent consideration, this Court reaches a conclusion identical to that reached twice below: the statements were voluntary. The facts surrounding those statements are as follows.

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[25]Indeed, this was already the case. In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) the Eleventh Circuit held that a Caldwell claim was not procedurally barred on a federal habeas review precisely because the state Supreme Court had arguably addressed the merits of such a claim in disposing of the petitioner's 3.850 motion [we "clearly and conclusively refute any claim that there was any constitutional infirmity in the trial." Mann v. State, 482 So.2d 1360, 1362 (Fla. 1986)]. The Eleventh Circuit reasoned, "[s]ince the Supreme Court of Florida chose not to enforce its own procedural default rule, federal habeas review of the claim is not barred." (cites omitted). Mann v. Dugger, 844 F.2d at 1448, n. 4.

[26]The state courts' disposition of this issue is noted only because state court resolution of subsidiary factual questions are given a statutory presumption of correctness. See Agee v. White, 809 F.2d 1487, 1493 (11th Cir. 1987); Lightbourne v. Dugger, 829 F.2d 1012, 1018-19 (11th Cir. 1987).

At approximately 8:40 a.m. on May 4, 1982, Bush and his girlfriend, Georganna Williams, arrived at the Martin County Sheriff's Department to ask about a car (belonging to Bush) which had been seized by the Department. While there, Mr. Bush was approached by Detective Sergeant Lloyd Jones who asked Bush if he would talk to Detective Holt and three other officers about the murder of one Francis Slater. (R. at 619). Bush agreed and was taken to an interrogation room. He was not placed under arrest at the time. Prior to asking Bush any questions, however, the officers told him that they were investigating the murder. The officers then informed Bush of his Miranda rights with the aid of an "interrogation advice of rights form." They read the form to him and then had him read his rights out loud; they asked him if he understood all of his rights, and asked if he was under the influence of alcohol or drugs. The petitioner indicated that he understood his rights; then he signed the waiver form. (R. at 686-89).

This first interview lasted approximately one and one-half hours. During that time, the petitioner denied any involvement in the murder and claimed he had gone to West Palm Beach that night to visit one Robert Lee Wilson to find out about a job. The officers suggested that the petitioner accompany them to West Palm Beach to find Mr. Wilson and verify the petitioner's story. The petitioner expressed his willingness to go. (R. at 728-29).

After conclusion of the first statement, the officers asked Bush if he was willing to take a polygraph test. He said he was. He was taken to the polygraph suite of the Sheriff's department

where he was turned over to Det. Kelly Vaughn. Immediately upon entering the suite, Vaughn took Bush through a "participating Miranda" form. Bush was informed of his rights a second time, both orally and in writing. The petitioner then signed the Miranda form along with another form authorizing the polygraph test. See Deposition of Det. Vaughn, Appendix VVV, p. 18-19. Preparation for the actual test took approximately two hours. Id. at 11. Just prior to the start of the test, Bush said "maybe I should talk to an attorney." Before Det. Vaughn could respond to this statement, Bush continued, "no, I just want to talk to my sister." Then, almost in the same breath, the petitioner said, "Well, I'm already here so let's get this over with." Id. at 13. Det. Vaughn then administered the test.

After completion of the polygraph test, the officers again asked the petitioner if he was willing to go to West Palm Beach even though he had no obligation to do so. (R. at 631-32). Bush volunteered to go. (R. at 632). Detective Sergeant Charles Jones and Deputy McClain took petitioner to West Palm Beach. Shortly after arriving, the officers located Mr. Wilson's home but Wilson was not there. They decided to await his return. After a few minutes, Bush told the officers there was no need for them to wait any longer because Wilson had no knowledge of what had happened. At 7:35 p.m., Bush gave his second statement, this time to Officers Jones and McClain. Prior to taking the statement in West Palm, Officer Jones asked Bush whether he was giving the statement voluntarily, whether he had been read his rights, and whether he under-

stood them. Bush answered "yes" to each question. (R. at 749). He was asked twice more during the course of the interview whether his statements were offered voluntarily. (R. at 752, 757). Bush responded in the affirmative. In the second statement, Bush confessed his involvement in the Slater murder. The officers returned to the Martin County Sheriff's Department.

At about 9:20 p.m. on that same night, Bush gave a third statement to Det. Jones and Deputy McClain. Prior to taking the third statement, Det. Jones again utilized an interrogation form to Mirandize the petitioner. Det. Jones read Bush his rights and the information provided on the waiver form, asked Bush if he understood what was read, and asked him again if he was giving the statement voluntarily. Bush signed the waiver form and stated that he understood his rights and was voluntarily giving the statement. (R. at 761-63). He confessed to his involvement in the murder a second time. Following the third statement, Bush was incarcerated in the county detention center.

He gave his fourth statement on May 7, 1982. On this date Bush notified Art James Jackson, the administrator for the Martin County Sheriff's Department, that he wanted to see Sheriff Holt. (R. at 794). Mr. Jackson contacted Sheriff Holt who went to the jail. (R. at 796). The petitioner told the Sheriff that he was being accused of something and wanted to tell his part to get it straight. (R. at 797). The Sheriff told Bush that he could not talk to him because he, Bush, was not represented by an attorney. The petitioner said he still wished to talk and he directed the

sheriff to call his attorney, Mr. Schopp. Mr. Bush spoke with Mr. Schopp on the phone and then allowed Sheriff Holt to talk with him (Schopp). (R. at 652). Mr. Schopp informed the Sheriff that he had advised Bush not to talk but that Bush had indicated that he was going to talk anyway. (R. at 654-55). The Sheriff then directed Lieutenant David Powers to take Bush's statement. (R. at 655). Lt. Powers spoke with Schopp as well. (R. at 659).

Lt. Powers took Bush to his office in the Detective Bureau and prepared a waiver of rights form. (R. at 660). Prior to giving the statement, Bush was read his rights again. Bush read the form; indicated he understood what it meant, and then signed it. (R. at 660-61). Bush was informed of his rights yet another time when Lt. Powers began recording his statement. (R. at 803). Lt. Powers even told Bush that his attorney recommended he not talk with anybody, and asked Bush once again whether he was sure he wanted to make another statement. (R. at 811-12). Bush said "yes," and gave his fourth statement to Lt. Powers.

The petitioner challenges the use of the four statements at trial on two grounds. First, he argues that he waived his Miranda rights involuntarily. Second, he claims that officers failed to honor his invocation of the right to counsel prior to administration of the polygraph test and therefore all subsequent statements should have been excluded from evidence.

A voluntary statement is one given by a defendant who has made an "independent and informed choice of his own free will, [while] possessing the capability to do so, his will not being overborne by

the pressures and circumstances swirling around him." Singleton v. Thigpen, 847 F.2d 668, 670 (11th Cir. 1988) quoting Jurek v. Estelle, 623 F.2d 929, 937 (5th Cir. 1980). On habeas review, the burden of proving involuntariness rests with the petitioner. Martin v. Wainwright, 770 F.2d 918, 925 (11th Cir. 1985). The Court must look to the totality of the circumstances surrounding the statements to determine whether the record supports a finding of involuntariness. Martin, 770 F.2d at 925; Jurek, 623 F.2d at 937. Also, in a federal habeas proceeding, a statutory presumption of correctness applies to "subsidiary factual questions" resolved in state court proceedings. Agee v. White, 809 F.2d 1487, 1493 (11th Cir. 1987). A federal court is to give great weight to the conclusions of a coequal state judiciary, even if the decisions are not binding. Lightbourne v. Dugger, 829 F.2d 1012, 1018-19 (11th Cir. 1987).

Initially, the Court notes that officers read the petitioner his full Miranda rights three different times on May 4. Additionally, the petitioner was reminded of his rights prior to making the second statement. On May 7, the petitioner was read his rights two times and was allowed to talk with his attorney before making his statement. Not once during any of the statements did he indicate he was having trouble understanding the officers or any of his rights. Instead, the petitioner indicated that he understood his rights each time they were read to him, and that the statements he made were voluntary. He signed four waiver forms.

The petitioner argues that, despite all of the warnings, he is so mentally and psychologically deficient that "interrogation" techniques utilized by the officers resulted in the involuntary relinquishment of his right to remain silent. In support of this argument, the petitioner offers the report of Dr. Carbonell. Dr. Carbonell concludes that Bush's limited intellectual functioning, significant deficits in verbal skills, and inability to deal with verbal information, make it improbable that he willingly, knowingly, or intelligently waived his rights. While the mental state of a defendant can be a significant factor in the voluntariness calculus, this factor by itself is insufficient to make an otherwise proper waiver involuntary. See Colorado v. Connelly, 479 U.S. 157, 164 (1986); Singleton, 847 F.2d at 670; United States v. Scheigert, 809 F.2d 1532 (11th Cir. 1987). "Rather, 'coercive police activity is a necessary predicate' to a finding that the [waiver] by a person with a low intelligence level is involuntary." Singleton, 847 F.2d at 671 quoting Connelly, 479 U.S. at 167; see also Scheigert, 809 F.2d at 1533. Carbonell's conclusions were reached more than five years after the fact; they are belied by the record and are arguably undermined by the conclusions of D'Amato.

The record in this case is void of any police activity that this Court can classify as unduly coercive. The petitioner argues that comments such as "we're coming on strong," "we wouldn't be at this point if we didn't have something," "only one person pulled the trigger," "if you're not the one who pulled the trigger, that's in your favor," "it's time to come clean," "we know you ain't the

one that pulled the trigger," etc., should be considered coercive because they were designed to override the petitioner's free will. The Court cannot agree.

First, there is nothing in the record to indicate that Bush's will was ever overridden or that the officers had any indication of his alleged mental incapacity. Bush was responsive and appeared to understand everything that was going on. He initiated much of it. The officers had no reason to coerce Bush's statements because he was so eager to provide them, to "get things straight." Far from an "overridden will," petitioner's actions (i.e., continual denials and his attempt to fabricate an alibi) attest to his ability to think for himself and to assert himself in a stressful situation. Upon a careful review of the record, the Court finds absolutely nothing improper about the way in which Bush was interrogated. This finding is consistent with that reached by the trial court and the Florida Supreme Court. See Bush v. State, 461 So.2d 936 (Fla. 1984); see also Paramore v. State, 229 So.2d 855, 858 (Fla. 1969); and La Pocca v. State, 401 So.2d 866, 868 (Fla. 3d DCA 1981). Absent improper actions by the officers, Bush's limited intellectual capacity alone does not render his waivers involuntary. Singleton, 847 F.2d at 670. Accordingly, the Court finds that Bush voluntarily waived his Miranda rights.

Bush's second objection is that he invoked his right to counsel prior to undergoing the polygraph test and therefore no subsequent statements should have been admitted into evidence. As the

former Fifth Circuit explained in Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979):

> [W]henever even an equivocal request for an attorney is made by a suspect during a custodial interrogation, the scope of that interrogation is immediately limited to one subject and one only. Further questioning thereafter must be limited to clarifying that request until it is clarified .... And no statement taken after that request is made and before it is clarified ... can clear the Miranda bar (emphasis added).

Id. at 771-72. However the word "attorney" does not have a talismanic quality which prevents further questioning once spoken by a defendant. See Id. at 772. Once a defendant's request is clarified, the interrogation may continue if the defendant wishes to continue without the aid of counsel. See Nash v. Estelle, 597 F.2d 768 (5th Cir. 1979).

Here, the petitioner's statement needed no further clarification. Initially, Bush voiced an equivocal desire for counsel which he immediately withdrew. He clearly expressed his desire to proceed with the polygraph. The Court finds that Bush clarified his own intentions and there was no need for Det. Vaughn to seek further clarification. Vaughn did not violate Miranda by continuing with the test. Claim X is denied.

CLAIM XI

THE PETITIONER WAS DEPRIVED OF EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY JUDICIAL INSTRUCTION WHICH MAY HAVE MISLEAD THE JURY INTO THINKING THAT IT HAD TO REACH A MAJORITY RECOMMENDATION REGARDING SENTENCING.

The petitioner claims that the jury was lead to believe that it could not return with a vote evenly split between recommending life and recommending death. Petition, at 213-223. Although the

defense did not object, at trial, to the statements with which it now contends, those contentions were raised before and dismissed by the Florida Supreme Court on direct appeal. See Bush v. State, 461 So.2d at 941.[27] In any event, they are without merit. After advising the jury that its decision did not have to be unanimous but "may be made by a majority," the trial judge clarified his instruction:

> Now, if the majority of the jury determines that John Earl Bush should be sentenced to death, your advisory sentence will be 'a majority of the jury by a vote of blank advises and recommends to the court that it impose the death penalty upon John Earl Bush.' One the other hand, if by six or more votes the jury determines that John Earl Bush should not be sentenced to death, your advisory sentence will be 'the jury advises and recommends to the court that it impose a [life sentence].'

(R. at 1290) (emphasis added). Even so, petitioner has failed to demonstrate that his jury was confused or split six to six, and thus he has failed to carry his burden of showing prejudice in the instructions. See Adams v. Wainwright, 764 F.2d 1356, 1369 (11th Cir. 1985); Henry v. Wainwright, 743 F.2d 761, 763 (11th Cir. 1984). Upon this Court's independent consideration of the issue, Claim XI is denied.

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[27]The Court notes the state court rulings for the effect they have on deciding whether the claim is procedurally barred. See Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988). Since the Florida Supreme Court considered the claim on its merits, this Court did also.

CLAIM XII

THE PROSECUTION'S VIOLATION OF STATE DISCOVERY RULES VIOLATED PETITIONER'S DUE PROCESS RIGHTS, HIS RIGHT TO A FAIR TRIAL, AND HIS RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES AGAINST HIM, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The petitioner claims an investigator's testimony contradicted an earlier deposition and therefore he, Bush, was entitled to a mistrial or at least a hearing pursuant to Richardson v. State, 246 So.2d 1149, 1151 (Fla. 1979). The trial judge granted neither and Bush claimed error. The Florida Supreme Court considered and rejected this precise claim on direct appeal. Bush raises it again.

On July 22, 1982, defense counsel took the deposition of Detective John Forte. Forte testified that he had taken a statement from a Ms. Charlotte Gray who had seen the defendant the night of the murder. After giving a brief description of what Ms. Gray had reported, Forte was asked the following:

> Q: Okay. Was a photo lineup also conducted with Ms. Gray?
>
> Forte: Yes there was.
>
> Q: Okay, and was she able to make any identification of any of the defendants?
>
> Forte: No ma'am.

Deposition of Detective Forte, p.10. See Supplemental Record from direct appeal to the Florida Supreme Court. Later in the deposition, Forte was asked:

> Q: And being the detective involved and having investigated the matter fully, do you have any evidence which would indicate that the individuals who came into Charlotte Gray's store are the same individuals who are charged with the murder of Frances Slater?

Forte: No, I don't.

Id. at 21. Finally, Forte was asked once again:

Q: ...[W]as Charlotte Gray shown any photographs at any time that you're aware of?

Forte: I believe she was.

Q: And do you know whose photographs they were?

Forte: Off hand I can't remember, sir--off hand I can't recall.

Q: Were you present when she was shown the photographs?

Forte: Yes.

Q: Was she able to identify any of the photographs?

Forte: No.

On August 31, 1982, Ms. Gray's deposition was taken. Ms. Gray testified that she was able to identify one picture from the photo line-up because it looked just like one of the persons, who was in her store. See Supplemental Record for first appeal to the Florida Supreme Court, Deposition of Charlotte Gray, p. 29. However, she could not identify which of the two people it was, id. at 30; she said she was pretty sure regarding her identification, although she would not stake her life on it. Id. at 31.

At trial, Gray testified that she had not been able to identify any one in a live line up, but had been able to identify someone from a photo line-up. (R. at 485, 491). The state then called Detective Forte who testified that Ms. Gray had picked Bush's picture out of a line-up of twenty-four pictures. (R. at 507D). During cross examination, the defense attorney went through Forte's deposition pointing out where Forte testified that Ms. Gray had not

been able to identify any of the photographs. (R. at 507K). On redirect, Forte explained that the inconsistency in his testimony arose because the defense attorney had asked different questions at trial and during the deposition.

The petitioner argues that Detective Forte's misleading deposition testimony and the prosecution's failure to disclose Gray's positive identification of Bush violated the discovery rules set forth in the Florida Rules of Criminal Procedure. Furthermore, the petitioner contends that the trial court erred by failing to conduct an inquiry into the matter to determine appropriate sanctions for the violations in accordance with Richardson v. State, 246 So.2d 771 (Fla. 1977). On direct appeal, the Florida Supreme Court found these arguments to be without merit holding that Detective Forte and the prosecution did not violate Florida's discovery rules. Bush v. State, 461 So.2d at 938.

The issues raised in this claim are questions of state law. The proper inquiry when a federal court reviews a state court conviction is whether the alleged misconduct violated due process by rendering the petitioner's trial fundamentally unfair. See Walker v. Davis, 840 F.2d 834 (11th Cir. 1988); Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984). Here, the petitioner's counsel was aware of the identification prior to trial despite Det. Forte's deposition testimony. Gray testified twice at her deposition that she identified a picture during the photo line-up. Petitioner's counsel attended Ms. Gray's deposition. Additionally, counsel was allowed to cross-examine both Ms. Gray and Det. Forte about the

identification. In fact, counsel confronted Det. Forte with the inconsistencies in his testimony. Upon due consideration, the Court finds that the alleged misconduct did not render the trial fundamentally unfair and did not rise to the level of a constitutional violation. Accordingly, Claim XII is denied.

CLAIM XIII

THE PETITIONER WAS DEPRIVED OF HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY THE PROSECUTOR'S USE OF HYPNOTICALLY INDUCED TESTIMONY AT TRIAL.

The petitioner claims that he was deprived of the right to cross-examine Danielle Symons, a state witness who identified Bush as one of the men in the convenience store on the night of the abduction, because Symons' testimony had been hypnotically refreshed. Petition, at 223-227. This issue was not raised on direct appeal and is therefore procedurally barred under Florida law. See e.g., Kennedy v. State, ___ So.2d ___ (Fla. June 8, 1989); O'Callaghan v. State, 461 So.2d 1354, 1355 (Fla. 1984). Even though petitioner's failure to raise this claim before the state courts has precluded their express finding that it is procedurally barred, this Court is bound by the state's rules of procedure and not just by its specific procedural rulings. Lindsey v. Smith, 820 F.2d 1137, 1143 (11th Cir. 1987). Moreover, Miss Symons testimony was not prejudicial. See Claim I (d) above. Claim XIII is therefore denied.

CLAIM XIV

PETITIONER'S EIGHTH AMENDMENT RIGHTS TO A RELIABLE SENTENCING DETERMINATION WERE VIOLATED BY THE IMPROPER INTRODUCTION OF INFLAMMATORY AND PREJUDICIAL PHOTOGRAPHS AT HIS CAPITAL TRIAL.

The petitioner argues that his trial was fundamentally unfair because photographs of his victim's body were admitted into evidence during the guilt phase of his trial. This claim was also raised before and rejected by the Florida Supreme Court. Federal courts possess limited authority to review state court evidentiary rulings in habeas corpus actions. Hall, 733 F.2d at 770. Generally, a federal court will not review a trial court's actions with respect to the admission of evidence. Id. at 770. A petitioner will be granted relief based on a state evidentiary ruling only when the violation results in the denial of fundamental fairness. Id. at 770. Specifically, the admission of prejudicial evidence justifies relief only when "the evidence 'is material in the sense of a crucial, critical, highly significant factor.'" Nettles v. Wainwright, 677 F.2d 410, 415 (5th Cir. Unit B 1982) quoting Hill v. Henderson, 529 F.2d 397, 401 (5th Cir. 1973).

In the case at bar, the photographs were relevant and properly introduced under Florida law. See Bush v. State, 461 So.2d 936, 939 (Fla. 1984); Williams v. State, 228 So.2d 377 (Fla. 1969). They are not so inflammatory or gruesome as to deprive the petitioner of a fair trial. Nor were they a crucial, critical or highly significant factor in the petitioner's trial. Accordingly, the Court finds that the petitioner's trial was not rendered fun-

damentally unfair by the introduction of the photographs and Claim XIV is denied.

CLAIM XV

BUSH WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHTS BY THE PROSECUTOR'S INTRODUCTION INTO EVIDENCE THE RESULTS OF A POST-ARRAIGNMENT LINE-UP CONDUCTED BEFORE BUSH HAD BEEN APPOINTED COUNSEL AND HIS APPELLATE COUNSEL WAS INEFFECTIVE IN NOT RAISING THIS ISSUE ON APPEAL.

The petitioner claims he participated in a lineup after his right to counsel had attached but before he had been provided an attorney. Petition at 230-34. Since the issue is now procedurally barred under Florida law, see e.g., Kennedy v. State, ___ So.2d ___ (Fla. June 8, 1989); O'Callaghan v. State, 461 So.2d 1354, 1355 (Fla. 1984); it appears petitioner is pursuing the claim that his appellate counsel was constitutionally ineffective in not raising the lineup issue on direct appeal. However, it is difficult to argue, as Mr. Bush's current counsel does, that the introduction of evidence regarding Bush's identification in the lineup was at all prejudicial. The lineup took place on May 12, 1982--5 days after Bush had given four voluntary statements to the police. At trial, Danielle Symons testified that she was at the lineup and that she had identified Mr. Bush as the man she had seen at the convenience store on the night of the murder. Bush admitted as much and more in three of his four voluntary statements. Moreover, Bush's trial counsel did object to the admission of the lineup results on the ground that waiver of counsel was a necessary predicate. (R. at 364). The trial court overruled the objection since the right to counsel had not attached prior to May 20, 1982 (the

day Bush was indicted). The manifest lack of prejudice in appellate counsel's "failure" to argue this issue on appeal precludes any Strickland violation. While Bush's current counsel may choose his own strategy, he cannot properly fault a former counsel for "failing" to litigate on appeal any and every "appellate-type" issue which may have occurred to him regardless of how frivolous. Claim XV is denied.

CLAIM XVI

THE PETITIONER'S EIGHTH AMENDMENT RIGHTS WERE VIOLATED BY THE SENTENCING COURTS REFUSAL TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD.

Next, the petitioner contends that the trial court's failure to find the presence of any mitigating circumstances violated the eighth amendment. The finding of mitigating circumstances during the penalty phase of the trial is a factual determination subject to review under Title 28 U.S.C. §2254(d). This statute creates a presumption of correctness for factual findings by an appropriate state court. See Sumner v. Mata, 449 U.S. 539 (1981). Pursuant to this presumption, the factual findings of the state court shall not be disturbed unless they are not fairly supported by the evidence. See Magwood v. Smith, 791 F.2d 1438, 1448 (11th Cir. 1986).

In the case at bar, the petitioner argues that the trial court erred by not finding the following mitigating circumstances:

(a) That Bush was an accomplice in the capital felony committed by another person and his participation was relatively minor,

(b) that Bush was intoxicated at the time of the offense,

(c) that Bush was remorseful and confessed to the crime, and

(d) that the victim was not sexually assaulted.

The first circumstance listed by the petitioner is a statutory mitigating factor. See F.S. §921.141(6)(d). Upon review of the record, this Court finds that the trial court's refusal to find this factor present is supported by the evidence. Bush's argument that the separate requirements of this factor should be viewed independently is unpersuasive. The clear language of the statute requires that Bush be an accomplice in the crime, that another person commit the capital felony, and that Bush's role in the crime be relatively minor before this mitigating factor applies. There was substantial evidence presented at trial that Bush's role in the crime was far from minor.

The final three mitigating circumstances cited by Bush are nonstatutory mitigating factors. As recognized by the trial court, neither a jury nor a court are bound by the statutory mitigating factors and each may consider anything in mitigation of the petitioner's sentence. See Lockett v. Ohio, ___ U.S. ___ (1978). Here, the trial court found the record "totally void of anything that may be said in [Bush's] behalf," (R. at 1307), thus rejecting the three nonstatutory factors presented in the petition. This court cannot say that the trial court's finding was erroneous.

The trial record reveals very little testimony concerning Bush's remorse. In fact, petitioners counsel testified at the evidentiary hearing that Bush was very cold and unremorseful.

(H. at 355). Additionally, as discussed in Claim I above, the record reveals sufficient evidence to find that Bush was not so intoxicated at the time of the crimes as to diminish his role in the murder or his capacity to formulate a specific intent. Finally, the fact that Mr. Bush and his co-defendants did not sexually assault Ms. Slater is hardly the type of mitigating evidence of which the court is required to take notice and for which it is required to express appreciation. Parker, Cave, Johnson and Bush robbed, kidnapped and murdered their victim in cold blood. This Court will not require another to be more lenient with them because they did not sexually assault her or perpetrate any number of other atrocities against her person. For the reasons stated above, this Court finds that the trial court's factual findings regarding mitigating factors are supported by substantial evidence. Accordingly, Claim XVI is denied.

CLAIM XVII

BUSH WAS DEPRIVED OF RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY PROSECUTORIAL AND JUDICIAL "BURDEN-SHIFTING" DURING THE SENTENCING PHASE OF HIS TRIAL.

Bush claims that his jury was instructed that he bore the burden of proof on the issue of whether he should live or die, while Florida law places that burden on the state. Petition, at 239-44. See Arango v. State, 411 So.2d 172, 174 (Fla. 1982); and Sandstrom v. Montana, 442 U.S. 510 (1979). He did not object to the instructions given or comments made at trial and he failed to raise his current claim on direct appeal. That failure renders the claim procedurally barred under Florida law. See Porter v.

State, 478 So.2d 33 (Fla. 1985); O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984); Lindsey v. Smith, 820 F.2d 1137, 1143 (11th Cir. 1987). Claim XVII is denied.

In conclusion, and after careful consideration of each of the claims raised herein; the Court finds that the petition for federal habeas corpus filed on behalf of the defendant petitioner John Earl Bush is without merit, and the same is hereby DENIED.

DONE AND ORDERED in Chambers in Tampa, Florida this 7TH day of August, 1989.

George C Carr

UNITED STATES DISTRICT JUDGE